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Supreme Court, U.S.
FILED
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No. (D)

IN THE

SUPREME COURT OF THE UNITED STATES

A. M. ELSHINNAWY

Petitioner

v.

COMMISSIONER OF
SOCIAL SECURITY
ADMINISTRATION

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

A. M. ELSHINNAWY
397 Stratford Avenue
Collegeville, PA 19426
Phone: (610) 489-3605

QUESTIONS PRESENTED

The issue here concerns the application of the Social Security(SS) law addressing the Windfall Elimination Provision (WEP). 42U.S.C.§ 415(a)(7). APPENDIX N.

SS arbitrarily and without any explanation(APPENDIX K) decided that petitoner's SS benefits should be reduced by a sizable amount and the petitioner believes that this action is discriminatory and unconstitutional. In addition, this dispute that started in early 1998 was reviewed by nine authorities and all avoided to settle this important question of federal law of how to apply the WEP correctly.

Petitioner, therefore prays that this highest Court will bring this question to rest in a just manner.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CASES PAGE NUMBER

PETITIONER IS INCAPABLE TO CONDUCT THE NECESSARY RESEARCH TO PROVIDE THE NEEDED INFORMATION.

STATUTES AND RULES	Appeared on pages
42 U.S.C.§ 415(a)(7)	2, 3, 4, 6, 7, 8, 9, 12, 14, 15
20 CFR 404.213(e)	2, 3, 9
42 U.S.C. § 405(g)	2, 6
215(a)(7) of the SS Act	2, 7, 8

OTHER - THE CONSTITUTION

Petitioner's knowledge of the Constitution is very limited to a layman's knowledge. The applicable part for this case can be stated as: "All people are created equal and should be equally treated under the law".

This is not happening in this case. The pages on which the constitutionality is questioned in this case are: The Questions Presented page, 9, 10, 12, and 14.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is
[*] reported at_____; or
[*] has been designated for publication but is not yet reported; or
[*] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is
[*] reported at_____; or
[*] has been designated for publication but is not yet reported; or
[*] is unpublished.

* Petitioner is incapable to conduct the necessary research to provide the needed information.

JURISDICTION

For cases from the Federal courts:

The date on which the United States Court of Appeals decided my case was June 21, 2007.

A timely petition for rehearing was denied by the United States Court of Appeals on August 21, 2007 , and a copy of the order denying rehearing appears at Appendix D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION

Petitioner's knowledge of the Constitution is very limited to a layman's knowledge. The applicable part for this case can be stated as:" All people are created equal and should be equally treated under the law.

STATUTORY PROVISIONS

42 U.S.C.§ 415(a)(7) Computation of Primary Insurance Amount.

20 CFR 404.213(e) Computation Where You Are Eligible For Pension.

42 U.S.C. § 405(g) Judicial Review.

215(a)(7) of the SS Act Computation Of Primary Insurance Amount.

IV. STATEMENT OF THE CASE

1. On November 12, 1997, Elshinnawy applied for his old-age Social Security (SS) benefits, to start at age 65 i.e. on February 1, 1998. In the transcript (Tr 36-38). On that day Elshinnawy did not know how much his pensions,due to his civilian job with the navy for almost 10 years. On December 22, 1997 SS notifeid Elshinnawy of his SS benefits. Appendix M. After applying for the pension and settling the amount of the pension with the Office of Perssonnel Management (OPM), Elshinnawy notified SS of the pension amount on 6/24/98. Twenty months later, in February 2000, Elshinnawy was notified by SS that his SS benefits will be reduced due to the Windfall elimination Provision (WEP). Appendix L. In August 2000, Elshinnawy filed a Request for Reconsideration, Tr. 50-51, and twenty months later, April 2002, SS responded to the request with Notice of Reconsideration. Appendix K. This resulted in a long series of appeals which are summarized in the following paragraphs.

2. In 2002, SS Notice of Reconsideration, Appendix K, shows in detail the process of calculating Elshinnawy's SS benefits until the point of applying the WEP where it states:

> "Under this modified formula the first band of the benefit formula is reduced from the usual 90 percent to 40 percent ...Section 404.213(e) of the SS Regulations No 4 lists six exceptions to the modified computation formula. However, none of these exceptions are shown to be met in this case".

Clearly, this statement offers no detail at all particulary with respect to the situations covered by 42 U.S.C.§ 415(a)(7)(D) i.e. SS never gave an explanation concerning

the definition of "years of coverage", the number of "years of coverage" Elshinnawy has and why the term "CREDITED" is used in this subparagraph instead of "years of covered work history".

3. The Administrative Law Judge (ALJ) in his May 27, 2003 unfavorable decision Appendix J, on p. 3 of 3 (TR 94) states:

> "Claimant has also provided an extensive explanation of how the SSA wrongly calculated ...On the other hand, an employee of the SSA with expert knowledge....The undersigned finds that the latter document is most probative...".

4. Elshinnawy appealed the May 27, 2003 decision to the SS Appeals Council (AC). The AC in remanding the case to the ALJ on Feb. 9, 2004, Appendix I, ordered the ALJ on p.2 of 3 (TR 100) stating:

> "The ALJ will make findings and issue a decision regarding whether the SSA applied the WEP correctly,...".

5. The ALJ did not intend to make any findings in this issue. In his Notice of Hearing dated August 13, 2004, for an October 18, 2004 hearing, on p. 2 of 2 (TR 125) he states:

> "The hearing concern is whether the claimant is responsible for the overpayment of $5791.00 due to Civil Service Pension offset".

However, on Sept. 14, 2004, Elshinnawy requested from the ALJ (TR 131-132) that the WEP issue be considered in the October 18, 2004 hearing.

6. As a result of the October 18, 2004 hearing, the ALJ issued his unfavorable decision on November 5, 2004. Appendix H. On p. 2 (TR 27) of the decision, the ALJ states:

> "The revised benefit formula eliminates the windfall in benefits for indidividuals who have only minimal SS coverage and will receive a pension based on years of work in non-covered employment".

and on p.3 (TR 28) it states:

> "....However, under the windfall elimination provision, the 90 percent factor is replaced by a factor ranging from 50 to 80 percent...For those who reach age 62 or become disabled in 1990 or later, the 90 percent factor is replaced by a factor ranging from 85 to 40 percent depending on the number of years of "substantial" earnings the number holder has".

No mention is made concerning the number of years Elshinnawy has with "substantial" earnings. IN FACT DEFENDANT ADMITS THAT THIS IS TRUE IN PARAGRAPH 81 OF DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT (Docket # 6 of the DC's record).

7. Upon appealing the ALJ's Nov. 5, 2004 decision on Dec. 22, 2004,the AC in their March 7, 2005 Notice of AC Action, Appendix G, (TR 16-21), no mention was made concerning the WEP issue.

8. The AC issued their final unfavorable decision on May 3, 2005, Appendix F, (TR 7-15). On p.2 (TR 11),under the title "Evaluation of the Evidence", it states:

> "The SSA recomputed the claimant's benefits under the windfall elimination provision(WEP) and determined that his bene fits were subject to reduction...".

Claimant contested this statement. Why didn't the AC take any action to verify it?

9. The same May 3,2005 decision states on p.6 (TR 15) under the title "Findings":

> "After careful consideration of the evidence of record, the AC makes the following findings:1. The SSA correctly applied the windfall elimination provision in determining the claimant's old-age insurance benefits".

What findings did all these decisions reveal? Has the number of "years of coverage" Elshinnawy has, been determined ? The answer is NO!

10. Elshinnawy took the case to The District Court (DC) under 42 U.S.C. § 405(g). The Magistrate Judge (MJ) in his Report and Recommendation (RR), Appendix C, (Docket #16) merely repeats the numerous untrue statments used by SSA all through the case. On p. 1 of the RR, the MJ states the legal standards for his report:

> "Substantial evidence is relevant evidence viewed objectively as adequate to support a decision... Moreover, apart from substantial evidence inquiry, a reviewing court must also ensure that the ALJ applied the proper legal standards".

11. On p. 6 of the RR, it states:

> "On May 27, 2003, ...Further, although Elshinnawy argued that there had been an error ..., the ALJ FOUND that the calculations completed by an experienced SSA employee were more probative.."

On p. 7 of the RR it also states:

> "On Nov. 5, 2005, the ALJ FOUND that 1) the WEP was properly applied,....".

The MJ uses the word FOUND for both decisions. Did the MJ ascertain that the ALJ applied the proper legal standards? The truth is explained hereabove that the ALJ did not make any findings particulary with respect to the WEP issue.

12. The remainder of the RR is a continuation of the same style described above. Please refer to Elshinnawy's Objections to the RR (Docket 17).

13. The DC in its Order Filed on Feb. 28, 2006, Appendix B, (Docket #18) in footnote * on p.1 states:

> ".... Specifically, Plaintiff contends that section 215(a)(7)(D) of the Act, codified at 42 U.S.C.§ 415(a)(7)(D), excludes his RIB calculation from the WEP formula".

This is true and very refreshing, because it is the first time since the dispute began in 1998, that statement made by Elshinnawy, particulary with respect to the WEP has been acknowledged. The footnote continues on p. 2 stating:

> "Section 215(a)(7)(D) provides in pertinent part that the WEP formula "shall not apply in the case of an

> individual who has 30 years or more of coverage." 42 U.S.C.§ 415(a)(7)(D)...."Years of coverage" as used by section 215(a)(7)(D), corresponds to the "Years of coverage test" used to determine whether an individual has the minimum SS earnings required to qualify for a year of coverage after 1950".

It continues to state:

> "I will overrule Plaintiff's objection for two reasons. First, Plaintiff has failed to demonstrate that he has "30 years or more of coverage" as that phrase is used in section 215(a)(7)(D) ..."

Plaintiff did not fail to demonstrate what he contends. Plaintiff demonstrated repeatedly in all his briefs that he has 35 substantial "years of coverage". Most recently is what he explained in his "PLAINTIFF'S REPLY TO DEFENDANT"S BRIEF..." (Docket #15) pages 21,22 and 23 i.e. paragraphs 49 thru 60. These paragraphs are incorpotated herein by reference, the same as though pleaded in full. It is worth noting here that paragraph 57 states:

> "From TR. 55, Plaintiff has total indexed covered earnings of 627985.51 whereas the total substantial earnings below which this WEP legislation is meant to apply is 181,500.00".

i.e. if 42 U.S.C.§ 415(a)(7)(D) exempts an individual with 181,500.00 covered earnings, (35 years of covered work and has a pension from non-covered work), from WEP reduction, then reducing the benefits, due to the WEP, for an individual with 627,985.51 of covered earnings (with a pension from non-covered work) will be discriminatory and unconstitutional. It is also worth

noting here that Docket Entry on 3/27/2006 which indicates that Docket Entry #15 was missing when the case's record was transmitted to the Court of Appeals, is not a justification for the unfavorable decision of the DC because Plaintiff gave the same explanation in other briefs before, but was ignored. The footnote also continues to state:

> "Plaintiff cites to pages 54-55 of the record for the proposition that he has 35 years of work history covered by the Act. That part of the rcord, however, demonstrates that only 21 years of Plaintiff's work history were covered by the Act".

The first sentence is not true. This indicates that the DC missed the point by ignoring Docket #15. What Plaintiff is trying to convey is that he has 35 benefit computation years,each of these years is CREDITED with 1495.00 monthly indexed covered earnings (due to the "Average Inxed Monthly Earnings method of benefit clculations). These monthly covered earnings are much greater than the "Substantial Earnings" required by 42 U.S.C.§ 415(a)(7)(D),20 CFR 404.213 or Exhibit 2 attached to Exhibit 12(TR. 75-78). This results in Elshinnawy has 35 benefit computation years, each of which is credited with three to four times the respective "substantial earnings" required to be a "year of coverage". i.e. Elshinnawy, therefore has 35 "years of coverage'which qualifies him to be exempt from the reduction of benefits due to the WEP. TR.75-78is Appendix E-SSA Public.#05-10045

It is worth noting here that Exhibit 12 of the Transcript, Tr.75-78, is a brief submitted by Elshinnawy on January 24, 2003 to the ALJ, but it does not have the exhibits originally attached to the text since SS lost them as they

did with almost all briefs that Elshinnawy submitted during the proceedings. A complete copy of the document was submitted as Attachment 1 to Docket # 13. Exhibit 2, mentioned above is attached herewith together with paragraph 7 on page 3 as well as the first page of Exhibit 12 as Appendix E since these documents show that Elshinnawy brought up the inequality (unconstitutionality and discrimination) in applying the same law in spite of the fact that Elshinnawy's covered earnings are much higher than the minimum required by SS.

The third paragraph of the footnote does not mix "covered work history" and "years of coverage" as things should be, but it was hoped that the court would declare the relationship between the two, taking into consideration fairness, constitutionality and non-discrimination.

14. Elshinnawy, therefore appealed the DC's Decision to tbe United States Court of Appeals For the Third District. Regretfully, the Court of Appeals Panel Judgment and Opinion (CAPD), which is submitted herewith as Appendix A, was disappointing for the following reasons:

i. On p.3 of the court's Opinion (Opinion), it states:

> "In August 2000, Elshinnawy filed a request for reconsideration...He challenged the application of the windfall elimination provision ("WEP") ... In 2002, the agency upheld the initial determination that the WEP was correctly applied to reduce Elshinawy's Social Security (SS) benefits ....".

In reviewing the agency's decision, the DC did not review whether the law was applied correctly or not. The DC merely reviewed the incorrect statement in the record

which was repeated over and over, thus creating the notion that substantial evidence exists in the record and that the problem is solved. In turn, the Court of Apeals did not ascertain that the law was applied correctly either.

ii. In footnote 3 on page 7 of CAPD Opinion, it states:

> "On appeal, Elshinnawy contends that the statutory formula is unconstitutional and dicriminatory. ...retirement benefits were calculated any differently for him as an immigrant...".

Elshinnawy never contended that. However, Elshinnawy insinuated uncotitutionalty and discrimination concerning the WEP issue, in paragraph 57 of Docket Entry #15, as well as other Briefs on record, but was not addressed in the CAPD Opinion.

iii. On page 9 of CAPD Opinion, it states:

> "...and therefore he is exempt from application of the WEP. We are not persuaded by Elshinnawy's interpretation of "years of coverage" to contemplate averaging...., especially when the Commissioner's implementing regulations explain that a "year of coverage" is in fact, dependent on a showing of minimum covered earnings in a particular year".

First, this is exactly what Elshinnawy did in paragraph 58 of Docket Entry #15 as well as other Briefs on record. Elshinnawy took the minimum covered earnings into consideration and found out that any other interpretation of the law that allows reducing his benefits while it exempts someone else with one third or one fourth of his earnings is definitely discriminatory and unconstitutional.

Second, Elshinnawy is not after pursuing anyone with an argument. Elshinnawy is after applying the law (correctly) as it is, which has been avoided twice by SSA, twice by the ALJ, twice by the AC, once by the MJ, once by the DC, and the CAPD. None of these decision makers put in writing how many "years of coverage" Elshinnawy really has according to 42 U.S.C.§ 415(a)(7).

iv. On page 9 of CAPD Opinion, it states further:

> "There is substantal evidence in the administrative record to support the agency's determination that Elshinnawy does not qualify for the exception to the WEP application for having thirty or more years of coverage".

What evidence does the Opinion mean? Does it mean the repeated unproven statment to that effect? Elshinnawy contends and aproved in paragraph 49 of Docket Entry #15 and everywhere in his other Briefs that the agency, arbitrarily, pronounced that the issue is dead without giving any justification or proof. Doesn't every decision maker ascertain that statements on record are truthful before accepting them as evidence? Certainly, this has not been done in the case here.

v. Footnote *** on page 10 of CAPD states:

> "We have reviewed Document #15 of the District Court record, upon which Elshinnawy's Motion before this Court relies, and it does not alter our conclusion".

The document referred to here is "PLAINTIFF'S REPLY TO DEFENDANT'S BRIEF...". Defendant's Brief is

Docket Entry #12 entered on 11/30/05. It is a 28 page document which contains nothing but untruthful and/or deceiving statements. Docket #15 uncovered the truth and should have altered the conclusion, at least, regarding the issues contained in paragraphs i, ii, and iii hereabove.

Docket #12 is signed by William Reeser whose appearance in the case was docketed, also, on 11/30/05 and was added to the other four or five attorneys representing Defendant. This same document was submitted to the Court of Appeals, word for word, as BRIEF FOR APPELLEE. It was accepted by the DC and the Court of Appeals. In fact, some of the phrases were repeated in the MJ's and the CAPD's Opinion, without verification of their truth.

15. Elshinnawy, then submitted a petition to the Court of Appeals requesting rehearing en banc. The court denied the request on August 21, 2007 as is evidenced from Appendix D.

V. REASONS FOR GRANTING THE PETITION

The issue of applying the Windfall Eliminiation Provision correctly to Elshinnawy's old age Social Security benefits was started at the beginning of 1998 when he reached age 65. To-date two decisions by the Social Security Administration (SSA) two decision sby SS Administrative Judge, decision by a Magistrate Judge, one decision by District Court Judge, one decision by the United States Court of Appeals for the Third District panel of Judges for a decision of denial of a Petition For En Bank Rehearing, were rendered in this case.

A concise statement of the case setting out the facts is contained in this petition which states quotations from all the decisions rendered. They all avoided to settle an important question of federal law of how to apply the Windfall Elimination Provision correctly. 42 U.S.C.§ 415 (a)(7).

SSA decided arbitrarily and without any explanation that Elshinnawy does not meet any of the exceptions to be exempt from benefit reductions due to the WEP. In doing so, SSA created an unconstitutional and discriminary situation since an individual with 35 years of "substantial covered earnings" which total $181,500.00 of covered earnings on which he would pay SS taxes would be exempt from the WEP whereas, Elshinnawy who earned $627,985.51 in covered earnings and paid SS taxes on it would not be exempt from the WEP. That is why the lower courts avoided to address the problem directly, but hedged around it, and this is why this Court's ruling is of great importance to settle the question.

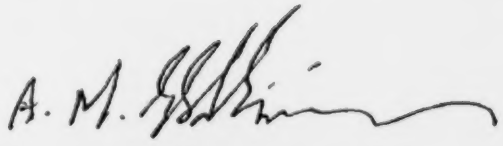
Keep in mind that 42 U.S.C. §415 (a) (7) was legislated to apply to thos idnvidiuals whos SS benefits

are calculated with the average indexed covered earnings formula and were below the $181,500.00 "substantial covered earnings" bench mark, as opposed to Elshinnawy's $627,985.51 covered earnings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: April 30, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2056

ABDELFATTAH M. ELSHINNAWY,
Appellant
v.
COMMISSIONER OF SOCIAL SECURITY
ADMINISTRATION

On Appeal From the United States
District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 05-cv-0361)
District Judge:Honorable
Lawrence f. Stengel

Submittted Under Third Circuit LAR 34.1(a)
December 5, 2006

Before: BARRY, CHAGARES AND ROTH,
CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

APPENDIX A

ORDERED AND ADJUDGED by this Court that the judgment ot the District Court entered March 1, 2006 be and the same is hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron, Clerk

DATED: June 21, 2007

NON PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2056

ABDELFATTAH M. ELSHINNAWY,
Appellant
v.
COMMISSIONER OF SOCIAL SECURITY
ADMINISTRATION

On Appeal From the United States
District Court
For the Eastern District of
Pennsylvania
(D.C. Civ. No. 05-cv-03061)
District Judge: Honorable
Lawrence f. Stengel

Submitted Under Third Circuit
LAR 34.1(a)
December 5, 2006

Before: BARY, CHAGARES AND ROTH,
CIRCUIT JUDGES

(Filed: June 21, 2007)

OPINION

PER CURIAM

Abdelfattah M. Elshinnawy appeals the order of the United States District Court District of Pennsylvania denying his motion for summary judgment and granting the motion for summary judgment of the Commissioner of the Social Security Administration("SSA" or "the agency"). We will affirm.

I

The parties are well-versed with the factual background of this case, so we will only summerize it here. Elshinnawy was born in Egypt on February 1,1933. He came to the United States in 1959 at age twenty-six and became a citizen in 1971. He completed his doctorate degree in engineering during the mid-1960s and entered the workforce. Elshinnawy worked as an engineer, first in private industy,and later for the United States Navy. In November 1997, Elshinnawy filed an application for Social Security retirement insurance benefits.* The application contains his acknowledgment that his civil service annuity or pension benefits from his Navy employment ("CSA") would offset his Social Security benefits; he agreed to notify the agency as soon as he learned the amount of the CSA to avoid the over-payment by Social Security. In January 1998, Elshinnawy received an interim CSA payment covering most of 1997, with notice that the monthly payment amount had not yet been determined. Elshinnawy later re-ceived an annuity adjustment payment covering all benefits due from February 1, 1995 (the date on which he turned sixty-two years of age) through January 31,1998, with a final

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* It appears that retirement insurance benefits ("RIB") are the only Social Security benefits at at issue in this appeal. For purposes of this opinion, we will refer to these benefits by the agency to Elshinnawy as his "Social Security benefits" or "retirement benefits".

monthly CSA payment, as of December 1997, was $574.00.

Elshinnawy received his first Social Security retirement benefits payment in February 1998. In late June, 1998, Elshinnawy notified the agency of the amount of his CSA. The agency did not immediately offset the amount of his retirement benefits due to his CSA, but it finally began doing so in March 2000, after notification of the reduction in February 2000. On May 3,2000, the SSA notified Elshinnawy that he had been overpaid by the agency in the amoount of $5791.00 for the period between January 1998 and March 2000. The agency gave him the options to either reimburse the amount or to have the agency withhold an amount from his benfits payments until the overpayment was repaid.

In July 2000, Elshinnawy filed a request for a waiver of overpayment recovery. In his request, he stated that he believed he was not at fault for the overpayment, but he did not complete the financial statement section of the form to support his waiver request. In August 2000, Elshinnawy filed a request for reconsideration of the overpayment determination. He challenged the application of the windfall elimination provision ("WEP"),the modified formula for computing Social Security retirement benefits when a claimant is also entitled to a pension based on employment not covered under Social Security, as is the case here with Elshinnawy's CSA. In 2002,the agency upheld the initial determination that the WEP was correctly applied to

reduce Elshinnawy's Social Security benefits, and that the calculation amount was correct.

Elshinnawy requested a hearing before an Administrative Law Judge("ALJ"), and hearing was held. The ALJ issued an unfavorable decision, finding that Elshinnawy was not without fault in receiving the overpayment, that the agency calculations were correct, and that the amount of the overpayment was correct. On appeal, the Apppeals Council remanded for reconsideration of evidence not previously presented to the ALJ, namely a June 1998 letter evidencing that Elshinnawy notified the SSA regarding the CSA. The Appeals Council directed the ALJ to conduct a supplemental hearing on whether the WEP was applied correctly, and, if an overpayment existed, whether Elshinnawy was not without fault in causing it. Elshinnawy was also given another opportunity to submit a fully completed waiver request or to explain to the ALJ why he declined to submit it.

In 2004, the ALJ conducted another hearing on the matter[2] but again issued an unfavorable decision. The Appeals Council affirmed, concluding that the WEP was properly applied, as Elshinnawy was receiving a pension from non-covered employment. The Apppeals Council also agreed that the agency's calculations were correct in the overpayment determination. Lastly, the Appeals Council found that recovery of overpayment could not be waived because Elshinnawy was not without fault; he did not properly report his CSA to the agency,and he received excess benefits that he should have known to be incorrect.

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[2] Elshinnawy was represented by counsel at the ALJ hearing.

The Appeals Council's decision became the Commissioner's final decision. See 20C.F. R. § 404.981.

In June 2005, Elshinnawy filed a pro se civil action in the United States District Court for the Eastern District of Pennsylvania seeking judicial review of the Commissioner's decision. The parties filed cross motions for summary judgment. The Magistrate Judge issued a report and recommendation that Elshinnawy's motion for summary judgment be denied and that the agency's motion be granted. Elshinnawy filled objections to the report and recommendation. By order entered February 28, 2006, the District Court overruled the objections and adopted the report and recommendation. Elshinnawy appeals.

II

We have appellate jurisdiction under 42 U.S.C.§ 405(g) and 28 U.S.C.§1291. We exercise plenary review of the District Court's order,but we may reverse the grant of summary judgment in the Commissioner's favor only if the Commissioner's decision is not supported by substantial evidence. See Burns v. Barnhart,312F.3rd 113,118(3d Cir.2002). Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Hartranft v. Apfel, 181 F,3d 358, 360(3d Cir.1999), citing Pierce v. Underwood 487 U.S.552 (1988). Because Congress has delegated to the Commissioner the responsibility to administer complex benefits programs, we defer to the Commiissioner's interpretation of Social Security legislation, as long as it is reasonable and not arbitrary and capricious. Sanfilippo v. Barnhart, 325 F.3d 391,393 (3d Cir.2003).

III

During the administrative proceedings, Elshinnawy argued that the agency miscalculated the amount of his retirement bene-fits. To the extend that he raises these challenges here, we will adress them briefly. In brief summary of the applicable statutes, the agency determines the amount of retirement benefits by calculating the primary insurance amount, which is based on a percentage of the individual's "average indexed monthly earnings" 42 U.S.C.§ 415 (a). The average indexed monthly earnings are determined by dividing the total wages paid in the number of months in the individual's "benefit computation years" 42 U.S.C.§ 415(b)(1). The benefit computation years equal the number of "elapsed years" minus five years. 42 U.S.C.§ 415(b)(2). Elapsed years are "the number of calendar years after 1950 (or, if later, the year in which the individual attained age 21) and before the year in which the individual..attained age 62," excluding any calender year included in a period of disability. 42 U.S.C.§ 415(b)(2)(B)(iii).

First, Elshinnawy contends that the agency used an incorrect number of elapsed years in calculating his retirement benefits. He points to the agency's April 2002 recon-sideration determination, which states that the "elapsed years" are calculated with reference to the number of years after the year the individual attains "age 22." On that basis, Elshinnawy argues that Agency should have used thirty-nine elapsed years instead of the forty elapsed years in its calculation. We conclude that substantial evidence supports the Appeals Council's finding that the reference to 'age 22' in expressing the "elapsed years" portion of the April 2002 analysis is a typographical error, and the calculation using forty elapsed years and thirty-five benefit computation years in

Elshinnawy's case is correct under the statute. Second, Elshinnawy asserts that the number of years in the calculation should be reduced because he did not arrive in the United States until 1959 at Age twenty-six, and he was unable to enter the work force during the years he was a student. Elshinnawy has not shown any statutory or regulatory authority for the agency to deviate from the prescribed method of calculating retirement benefits based on his personal circumstances, either under a theory of "disability" due to his not being in the United States until age twenty-six, or under any other theory.[3]

IV

The main focus of Elshinnawy's arguments on appeal relate to whether the agency properly applied the Windfall Elimination Provision, or WEP. In summary, and as relevant to this matter, the WEP applies to a benefits claimant who becomes eligible for benefits after 1985 and also becomes available for a benefit from non-covered employment (in this case, Elshinnawy's CSA). See 42 U.S.C.§ 415(a)(7)(A). Calculation under the WEP operates to reduce the percentage used to compute the primary insurance amount. 42 U.S.C.§ 415(a) (7)(B). One of the statutory exceptions is that the WEP

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[3] On appeal, Elshinnawy contends that the statutory formula is unconstitutional and discriminatory. His argument seems to be that the formula negatively impacts his benefits calulation as an immigration. We do not address Elshinnawy's constitutional claim it was not raised during the proceedings below and was not preserved for review. We note that Elshinnawy does not explain how his retirement benefits were calculated any differently for him as an immigrant as compared to non-immigrant retirees of like age who similarly delayed entering the work force for years beyond age twenty-one in order to pursuer educational goals.

does not apply to individuals who have thirty or more "years of coverage," a term definned in section 415(a)(1)(C)(ii). 42 U.S.C.§ 415(a)(7)(D).

Elshinnawy argues that the agency determined, without explanation, that he did not qualify for any of the statutory exceptions to applying the WEP. Indeed,he asserts that he qualifies for the exception as one who has more than than thirty "years of coverage." The essence of his argument is that, under his interpretation, the number of "years of coverage" is the same as the number of his benefit computation years. As discussed earlier, Elshinnawy has thirty-five benefit computation years, totaled from his forty elapsed years minus five.** See 42 U.S.C.§ 415(b)(2). As applicable to Elshinnawy, section 415(a)(1)(C)(ii) defines "years of coverage" as "the number equal to the number of years after 1950 each of which is a computation base year (within the meaning of subsection (b)(2)(B)(ii) of this section) and in each of which he is credited with wages..." Elshinnawy interprets this to mean that a "year of coverage" is the same as a benefit computation year, every one of which is a year "credited" with covered earnings, regardless of whether the wages were earned in a particular year. Extending his argument, he asserts that, because he has thirty-five benefit computation years, he also must have thirty-five years of coverage, and therefore he is exempt from application of the WEP. We are not persuaded by Elshinnawy's interpretation of "years of coverage" to contemplate averaging his earnings over a greater number of years

** Elshinnawy refers to having thirty-five "years of coverage" and thirty-five "computation base years," each credited with an average monthly covered earnings amount. However, it appears that he actually refers to his thirty-five "benefit computation years."

than were covered by Social Security,especially when the commissioner's implementing regulations explain that a "year of coverage" is, in fact, dependent on a showing of minimum covered earnings in a particular year. See, e.g., 20 C.F.R. § 404, Subpt. C., App. IV. There is substantial evidence in the administrative record to support the agency's determination that Elshinnawy does not qualify for the exceptipon to the WEP application for having thirty or more years of coverage.

V

When a claimmant's retirement benefits Should have been calculated under the WEP but were not, an overpayment to the claimant results. Waiver of an overpayment is appropriate when the claimant is (1)"without fault" in causing the overpayment, and (2) recovery would defeat the purpose of Title II of the Social Security Act, or would be against equity and good conscience. 42U.S.C.§404(b); 20C.F.R. §404.506(a).

We agree with the District Court's conclusion that there is substantial evidence in the administrative record that Elshinnawy was overpaid for the period between January 1998 and March 2000, and that he was not without fault." As noted earlier, Elshinnawy acknowledged on his initial retirement benefits application that receipt of his CSA could cause an overpayment in Social Security benefits. He received his final interim CSA payment in February 1998, and notified the SSA in late June 1998, after the CSA amount was finalized. Elshinnawy continued to receive the same amount of Social Security benefits for almost two years until the agency discovered the error, he continued to accept payments that he either knew or could have been expected to know were incorrect in amount. See 20 C.F.R.§ 404.507(c). He argues that he notified the agency in June

1998 of his CSA amount, and the overpayment resulted from the agency's lack of response until twenty months later. However, even though the SSA may have been at fault in making the overpayment, that fact does not relieve Elshinnawy from liability for repaymment if he is not without fault. See20C.F.R.§ 404.507. Because Elshinnawy is not without fault, he does not qualify for a waiver of recovery of the overpayment.°

VI

In conclusion, we find that the Commissioner's final decision is supported by substantial evidence and that the agency applied the correct statutes and regulations in evaluating Elshinnawy's case. We will affirm the judgment of the District Court. The motion to vacate the Magistrate Judge's report and recommendation and the District Court's order is denied.***

° As the District Court noted, Elshinnawy refused to submit requested financial information to support his waiver request because he viewed it as a "degrading" exercise. Elshinnawy argues that, under 20C.F. R.§ 404.506(f)(8),submission of financial information is not compulsory. Presumably, he bases his argument on the provisio's wording that financial information is collected "if necessary." We note that section 404.506(f)(8) concerns the submission of "updated" financial information; the provision is not at odds with section 404.506(c)'s direection that an individual requesting a waiver is to provide information to support a claim that recover would defeat the purpose of title II of the Act(see § 404.508) or be against equity and good conscience(see § 404.509). In particular, the inquiry under section 404.508 depends upon whether the person has sufficient income and othher financial resourcees to meet his ordinary and necessary expenses, including ordinary household living expenses and medical expenses.

*** We have reviewed Document #15 of the District Court record, upon which Elshinnawy's motion before this Court relies, and it does not alter our conclusion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

A.M. ELSHINNAWY	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 05-3061
	:	
v.	:	
	:	
JO ANNE BARNHART	:	
COMMISSIONER OF	:	
SOCIAL SECURITY	:	Filed
ADMINISTRATION	:	
	:	FEB 28 2006
Defendant	:	

MICHAEL E. KUNZ,
Clerk
By /s/ Dep Clerk

ORDER

AND NOW, this 25th day of February, 2006, upon careful and independent consideration of Plaintiff's motion for summary judgment (Docket No.10), as well as Defendant's response and motion for summary judgment (Docket No.12), and after reviewing the Report and Recommendation of United States Magistrate Judge Jacob P.Hart(Docket No.16) and Plaintiff's objections thereto (Docket No.17), it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

APPENDIX B

2. Plaintiff's objections to the Report and Recommendation are OVERRULED*, and

3. The Clark of Court shall mark this case CLOSED for statistical purposes.

BY THE COURT:

/s?

LAWRENCE F. STENGEL,J.

*Plaintiff objects to the Report and Recommendation by arguing, inter alia, that this retirement insurance benefits("RIB") amount should not be reduced by the windfall elimination provision("WEP") formula of section 215(a)(7)of the Social Security Act(the "Act"), codified at 42U.S.C.§ 415(a)(7). Specifically,Plaintiff contends that section 215(a)(7)(D) of the Act, codified at 42U.S.C?§ 415(a)(7)(D), excludes his RIB calculation from the WEP formula. Section215(a)(7)(D) provides in pertinent part that the WEP "shall not apply in the case of an individual who has 30 years or more of coverage." 42U.S.C.§ 415(a)(7)(D) also provides for specific RIB reductions in "the case of an individual who has more than 20 years of coverage but less than 30 years of coverage ..." Id. "Years of coverage", as used by section 215 (a)(7)(D), corresponds to the "years of coverage test" used to determine whether an individual has the minimum social security earnings required to qualify for a year of coverage after 1950. See id.

I will overrule Plaintiff's objections for two reasons. First, Plaintiff has failed to demonstrate that he ha "30 years or more of coveraGE" as that phrase is used in section 215(a)(7)(D). Plaintiff cites to pages 54-55 of the record for the proposition that he has 35 years of work history covered by the Act. That portion of the record, however,

demonstrates that only 21 years of Plaintif's work history were covered by the Act.

Second, the record in this case provides substantial evidence supporting Defendant's decision to deny Plaintiff retention of the overpayment amount. It appears that an experienced social security employee with "expert knowledge" of RIB calculations verified Defendants calculation. Record at 94. Moreover, section 215(a)(7)(D) completely exempts an individual from the WEP formula only when that individual "has 30 years or more of coverage." 42U.S.C.§ 415(a)(7)(D). As described above, the record demonstrates that Plaintiff has only 21 years of covered work history. Record at 54. Thus, I find that there is sufficient evidence to meet the differential "substantial evidence" standard. The remainder of Plaintiff's objections are adequately addressedd by the Report and Recommendation.

IN THE UNITED SATES DISTRICT COURT
FOR THE EASTERN ISTRICT
OF PENNSYLVANIA

February 16, 2006

RE: Elshinnawy V. Barnhart
CA No. 05-cv-3061

NOTICE

Encosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Jacob P. Hart, on this date in the above captioned matter. You are hereby notified that within ten(10) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file(in duplicate) with the clerk and serve upon all other parties written objections thereto(See Local Civil Rule 72.1 IV(b)).

In accordance with 28U.S.C.§ 636(b)(1) (B),the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as a special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

APPENDIX C

MICHAEL E. KUNZ
Clerk of Court

/s/

By:_____
Leesa B. Erickson, Deputy Clerk

cc: A.M. Elshinnawy
Eda Giusti, Esquire
Nicholas R. Cerulli, Esquire
William Brian Reeser, Esquire
Teri C. Smith, Esquire
Courtroom Deputy to Judge Lawrence F. Stengel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

A.M.ELSHINNAWY	:	CIVIL ACTION
	:	
v.	:	Filed Feb 16
	:	2006
JO ANNE B. BARNHART,	:	
Commissioner of	:	NO. 05-3061
Social Security	:	

REPORT AND RECOMMENDATION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE Feb 13,2006

A.M.Elshinnawy brought this action under 42U.S.C.§ 405(g) to review the final decision of the Commissioner of Social Security denying his claim for a waiver of recovery of an overpayment of Retirement Insurance Benefits("RIB"). The parties have filed cross-motions for summary judgment. For the reasons that follow, I recommend that Elshinnawy's motion be denied and the Commissioner's motion be granted.

Because this case concerns RIB instead of the more usual denial of disability benefits, I will first briefly discuss the legal framework.

I. Legal Standards

As a disability case, the role of this court on judicial review is to determine whether the Commissioner's decision is supported by substantial evidence. 42 U.S.C.§ 405(g);Richardson v.Oeralis,402 U.S 389(1971); Doak v.

Heckler,790 F.2d 26,28 (3d Cir.1986); Newhouse v. Heckler,753 F-.3d 283(3d Cir. 1985). Substantial evidence is relevant evidence viewed objectively as adequate to support a decision. Richardson v. Perales, supra at 401;Kangas v. owen, 823 F.2d 775(3d Cir.1987);Dobrowolsky v. Califano,606 F.2d 403(3d Cir.1979). Moreover, apart from substantial evidence inquiry, a reviewing court must also ensure that the ALJ applied the proper legal standards. Coria v. Heckler,750 F.2d 245 (3d Cir.1984).

The Social Security Administration("SSA") determines an individual's RIB by calculating his or her primary insurance amount ("PIA"). The PIA is based on a percentage of the individual's average indexed monthly earnings.42 U.S.C.§ 415(a).The average indexed monthly earnings are determined by dividing the total paid in by an individual by his benefit computation years.§ 415 (b)(1). Benefit computation years are equal the number of elapsed years minus 5 years. §415(b)(2), Elapsed years are defined as "the number of calendar years after 1950(or, if later, the year in which the individual attained age 21) and before the year in which the individual..attained age 62." § 415(b)(2)(iii). However, elapsed years exclude "any calendar year entirely included in a period of disability." Id.

When an individual is receiving Social Security benefits and a benefit from noncovered employment, such as a civil service annuity or pension("CSA"),the PIA is calculated through an alternate formula called the windfall elimination provision("WEP"). 42 U.S.C.§ 415(a)(7)(A).As its name suggests, the WEP offsets the amount of the RIB due to the CSA by reducing the percentage (from 90% to 49% used to calculate a claimant's PIA. Id. The WEP applioes to a claimant who

1)becomes eligible for benefits after 1985 and 2)receives a monthly payment based on non-covered employment.Id. The WEP applies the first month that the individual receives both Social Security and CSA benefits. Id.

When a claimant's RIB should have been calculated with the WEP but wasn't,it results in an overpayment to the claimant. The claimant then may request reconsideration and also waiver of repayment. Waiver is appropriate when the claimant is 1) "without fault" in causing the overpayment, and 2) recovery would defeat the purpose of Title II of the Social Security Act., 42 U.S.C.§ 404(b). Recovery would defeat the purpose of Title II if the individual needs substantially all of his current income to meet his ordinary and necessary living expenses. 20 C.F.R.§ 404.508. Both prongs of this test must be met in order to waive recovery.

To determine if an individual is without fault, all physical,mental,educational or linguistic limitations are considered.Id. Factors used to determine fault are:1)an incorrect statement by an individual which he knew or should have known to be incorrect, 2)failure to furnish information which he knew or should have known to be material, or 3)acceptance of a payment which he either knew or could have been expected to know as incorrect. 20 C.F.R.§ 404.507.

Only if the individual is without fault will it be necessary to determine whether recovery would defeat the purpose of Title II. This determination requires an assessment of an individual's income,assets,and expenses.Id. Social Security Ruling 74-28.

II. Facts and Procedural Background

Elshinnawy was born on February 1,1933. Recoed at 222. He was born in Egypt and came to the United States in 1959,becoming a citizen 1n 1971.Record at 223.He completed graduate work in 1966.Record at 227-8. He worked as an engineer in private industry for 20 years and then worked with the Navy for annother 10 years. Record at 224.

On Novembei 12,1997, Elshinnawy filed an application for RIB.Record at 36.The application indicates that Elshinnawy knew that he would be receiving a CSA from the Navy, which was not covered by Social Security. Record at 36-7.It also indicates that he understood that the CSA would cause an offset of his Social Security benefits.Id. He agreed to notify the SSA of the amount of the CSA "so as to avoid any overpayment from Social Security." Record at 37.

On December 16,1997, Elshinnawy received an intoductory letter from theCivil Service Retirement System. Record at 187. The letter noted that his CSA payments would begin in about a week.Id. On January 2,1998, Elshinnawy received an interim CSA payment cover ing all of 1997.Record at 188. The letter also indicated that the amount of monthly payment had not yet been determined,but it would be sent to him once it was.Id. On February 1,1998,Elshinnawy received his final interim CSA payment, covering benefits from the year he attained the age of 62,or 1995.Record at 116. At that time, he also received a statement that his monthly payment as of December 1997 was $574.00.Id.

Elshinnawy received his first RIB payment in February 1998.Record at 55. On June 26, 1998,

Elshinnawy notified the SSA of the amount of his CSA. Record at 115. The SSA did not immediately offset the amount of Elshinnawy's RIB payments due to the CSA. However, it finally did so in March 2000. Record at 56. The record indicates that Elshinnawy was first notified of the overpayment sometime in February 2000, and received a smaller RIB check that month. Record at 47,51,53 and56. On May 3,2000, the SSA sent Elshinnawy a letter explaining that because he had received a $5,791.00 overpayment due to the CSA,Elshinnawy could either reimburse the SSA for the amount, or the SSA would withhold an amount from his monthly payments until the overpayment was recaptured. Record at 139.

On July 11,2000, Elshinnawy submitted a Request For Waiver of Overpayment Recovery asserting that he was not at fault for the overpayment. Record at 39. Elshinnawy did not complete Section II of the form, which asks for the claimant's current financial status. Record at 41-5. On the Report of Contact form dated the same day, an SSA employee noted that Elshinnawy knew the overpayment was caused by his receipt of benefits under a CSA. Record at 47-8.

On August 3,2000, the SSA wrote Elshinnawy to determine if he was asking solely for a waiver of the overpayment or if he was also asking for reconsideration of the amount of the overpayment. Record at 49.On August 15,2000, Elshinnawy filed a Request for Reconsideration noting that he knew the WEP was being applied to him due to his CSA, but that it should not have been applied to him.Record at 51.

On April 8,2002, the SSA upheld the initial determination that the WEP was applied correctly due to Elshinnawy's CSA. Record at 52-7.In this decision, the

SSA reviewed in detail how to calculate the RIB and how the RIB is calculated differently when the WEP applies, resulting in a smaller RIB because of the pension from non-covered employment.Id. The calculations supported the SSA's conclusion Elshinnawy was overtpaid $5791.00. Record at 57.On May 20,2002, Elshinnawy agreed to withhold $161.00 from his monthly check in order to repay the overpayment,although he still was pursuing an appeal. Record at 62.

On June 7,2002, Elshinnawy requested a hearing in front of an administrative law judge("ALJ"). The hearing was originally scheduled for January 31,2003. At that hearing, Elshinnawy indicated that he would like to be represented by an attorney. Record at 204. On March 5,2003, an attorney entered his appearance on behalf of Elshinnawy. Record at32. Nevertheless, when a hearing was held on March 5,2003, Elshinnawy was again unrepresented.Record at 207-218. He indicated thhat he wanted to continue with the hearing without an attorney. Record at 210.

On May 27,2003,the ALJ issued an unfavorable decision, finding that Elshinnawy was not without fault in receiving the overpayment because he knew that his CSA would offset his RIB.Record at 93.Further, although Elshinnawy argued that there had been an error in the calculation of the overpayment, the ALJ found that the calculations completed by an experienced SSA employee were more probative as to the amount of the overpayment.Record at 94. Therefore, the ALJ found that the amount of the overpayment was correct, and that Elshinnawy was not without fault in receiving the overpayment.Id. For this reason, the ALJ denied Elshinnawy's request for a waiver of repayment.

Accordingly, on June 30,2003,Elshinnawy appealed this decision. Record at 96.

On February 9,2004, the Appeals Council remanded the case back to the ALJ for a supplemental hearing and a new decision based on evidence not previously presented to the ALJ. Record at 99. Specifically, Elshinnawy produced his letter dated June 26,1998, discussed above, as evidence of his notifying the SSA regarding hia CSA benefits. Id. The Council directed the ALJ to consider this new evidence, determine whether the WEP was applied ccrrectly, and if there was in fact an overpayment,whether Elshinnawy was at fault in causing it. Id.

On October 18,2004,Elshinnawy attended a third hearing in front of the ALJ. Record at 220-250. At this hearing,Elshinnawy was represented by an attorney and testified to why the WEP was improperly calculated and applied, and why he was not at fault for the overpayment.Id.

On November 5,2004,thc ALJ issued another unfavorable decision. Record at 157-165. The ALJ found that 1)the WEP was properly applied,2)the WEP was properly calculated, and 3)waiver of repayment is inappropriate because Elshinnawy was not "without fault." Record at 164. On January 6,2005,Elshinnawy requested a review of this decision. Record at 22.

On May 3,2005, the AppealsCouncil affirmed the ALJ's decision in a six-page written decision. Record 7-15. The Council agreed that the WEP was properly applied and calculated, and that recovery of overpayment could not be waived because Elshinnawy was not without fault. Record at 15. On June 27, 2005, Elshinnawy filed this appeal.

III. The Appeals Council's Decision and Elshinnawy's Motion for Summary Judgment

The Appeals Council first decided that Elshinnawy's RIB were calculated properly. Record at 12-4. Based on the calculations of the SSA, and the fact that Elshinnawy was never legally disabled, the number of months used to calculate the RIB was correct. Id.

The Council then decided that Elshinnawy was subject to the WEP, which when applied, resulted in Elshinnawy receiving an overpayment. Id. Because he received a pension from a non-covered employment, the amount of his RIB was required to be calculated by the WEP, an alternate formula used to calculate RIB.

Finally,the Council decided that recovery of this overpayment was not waived because Elshinnawy was not"without fault"in causing the overpayment. Id. Elshinnawy knew the RIB would be offset by a CSA from non-covered employment. Elshinnawy failed to properly inform the SSA of the amount of his CSA.Id. and once he did inform the SSA,for 20months Elshinnawy continued to accept RIB that had not changed. Record at 14. Therefore, he received benefits that he could have known were incorrect. Id.

In his motion for summary judgment, Elshinnawy first asserts that the SSA improperly calculated the amount of his RIB since the SSA did not take into consideration that he was a student for five years when he first came to the United States. Second, Elshinnawy maintains that the WEP was erroneously applied to him, and that he should not have been assessed as receiving an overpayment. Third, Elshinnawy argues that recovery of the overpayment should be waived because he is not at

fault for the overpayment, and further because recovery of the overpayment would defeat the purpose of the SSA.

IV. Discussion

A. The RIB Calculation

The Council correctly determined that Elshinnawy's RIB were calculated properly. Record at 12-3. The Council dismissed Elshinnawy's argument that his RIB should have been calculated using a smaller number of elapsed years. Record at 13. Secondly, the Council could find no authority supporting Elshinnawy's argument that his years as a student should not be counted toward his elapsed years since he was unable to work during that time. Record at 14. As discussed above, RIB are determined by calculating an individual's PIA which depends on the number of elapsed years, calculating periods of disability. See supra p.2.

First, it appears from the record that the SSA used the correct number of elapsed years to calculate Elshinnawy's PIA. The reconsideration decision Elshinnawy received from the SSA in April,2002, stated that"elapsed years"was calculated by reference to the number of years"after the year of attainment of age 22."Record at 54.However, the ALJ explained that this was a typographical error, and that the statutory language reads"after the year of attainment of age 21."Record at 13;42U.S.C.§ 415(b)(2) (iii). Elshinnawy turned 21 in 1954. He attained the age of 62 in 1995. Therefore, the proper number of elapsed years was 40 (1995-1955), as the Council correcctly determined.

Second, The Council has shown that time spent as a student is not considered a period of disability.

Elshinnawy asserts that his five years as a student should be considered as a disability since during that time of study, he was unable to work, and thus unable contribute to Social Security. However, the Appeals Council correctly noted that there is"no statutory or regulatory authority to grant this request." Record at14. This court has similarly found no authority supporting this argument.. Thus, Elshinnawy's five years as a student are not properly excluded from his total elapsed years.

B. The Windfall Elimination Provision

The Appeals Council was also correct in determining that the amount of Elshinnawy's RIB was properly calculated using the WEP. When Elshinnawy received his first RIB check, he was also receiving a pension from non-covered employment. Record at 55,187. This pension was from military employment, which was not covered by Social Security. See Doyle v. Barnhart, 2005 WL713343(E.D.Pa) (finding that the WEP was correctly applied to a claimant who received both Social Security benefits and a pension based on military employment). The WEP should therefore have been used to calculate his RIB from the beginning, in January 1998. Because the SSA did not apply the WEP to Elshinnawy until March 2000, Elshinnawy received an overpayment. Record at 56 (indicating that the amount of RIB went from $765.00 in February 2000 to $527.00 in March 2000).

C. Elshinnawy's Right to Waiver of Recovery of the Overpayment

I also conclude that the Commissioner correctly denied Elshinnawy's request for waiver of recovery of the overpayment. As outlined above, waiver is appropriate when the claimant is 1)without fault in causing the

overpayment, and 2)recovery would defeat the purpose of Title II of the Social Security Act. See supra p.2-3.

Here, there is substantial evidence that Elshinnawy was not "without fault." First, Elshinnawy knew from the date he first applied for benefits that his pension would offset the amount of Social ecurity benefits that he was receiving. Record at 37. Further, Elshinnawy agreed to notify the SSA of the amount of his CSA. Id. Third, once Elshinnawy got his final interim payment from the CSA on February 1,1998, he did not immediately notify the SSA. Record at 116. He waited until June 26,1998 to notify the SSA because the pension amount was not settled. Even if this delay was reasonable, Elshinnawy continued to receive the same amount of RIB until February 2000 when SSA discovered the error. This was almost two years after he first learned of his pension and 20 months after officially notifying the SSA of the CSA.Record at115-6. Therefore, since Elshinnawy failed to notify SSA of material information and he accepted a payment that he could have been expected to know was incorrect, there is substantial evidence supporting the Commissioner's conclusion that he was not without fault in causing the overpayment.Therefore, recovery cannot be waived.

Since Elshinawy is not without fault,it is not necessary to analyze Elshinnawy's income and expenses to determine whether recovery would defeat the purpose of Title II. However,it should be noted that Elshinnawy has refused to submit his income and expenses to the SSA, even though the ALJ left the record open for that purpose. Record at 245-6. He has stated at his hearing and in an October 25,2004, letter to the ALJ that it would be degrading to him to do so. Record at 41-8, 137-8,242. Information of his complete financial situation would be

necessary in order to properly assess this second prong of the test in order to waive recapture of the overpayment. Record at 13 and 36. Again, since Elshinnawy is not without fault, analysis of this issue is unnecessary.

V. Conclusion

In accordance with the above discussion, I made the following

RECOMMENDATION

AND NOW, this 15 day of February, 2006 it is RESPECTFULLY RECOMMENDED that Plaintiff's motion for summary judgment be DENIED; and it is further RECOMMENDED that Defendant's motion for summary judgment be GRANTED.

/s/

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

E N T E R E D

FEB 16 2006

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

A.M.ELSHINNAWY	:	CIVIL ACTION
v.	:	
JO ANNE B. BARNHART COMMISSIONER OF SOCIAL SECURITY	:	NO. 05-3061

ORDER

STENGEL,J,

AND NOW, this day of ,2006, upon consideration of Plaintiff's Motion for Summary Judgment, and the Defendant's Motion for Summary Judgment, and after careful review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The Defendant's Motion for Summary Judgment is GRANTED.

3. The Plaintiff's Motion for Summary Judgment is DENIED.

BY THE COURT

_____

LAWRENCE F. STENGEL,J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.06-2056

ABDELFATTAH M. ELSHINNAWY
Appellant

v.

COMMISSIONER OF SOCIAL SECURITY
ADMINISTRATION

On Appeal From the United States
District Court
For the Eastern District of
Pennsylvania
(D.C.Civ. No.05-cv-03061)
District Judge: Honorable
Lawrence F. Stengel

Present:SCIRICA,Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and ROTH,* Circuit Judges

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SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

APPENDIX D

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/Maryanne Trump Barry

Circuit Judge

Dated: August 21,2007
tyw/ch/cc: Mr.Abdelfattah M. Elshinnawy
Sandra G. Romagnole, Esq.

* Judge Roth's vote is limited to panel rehearing only.

146-34-0257 A.M.ELSHINNAWY January 24, 2003

EXPLANATION OF THE REASONS FOR APPEALING THE DECISION OF THE SOCIAL SECURITY ADMINISTRATION IN CALCULATING MY SOCIAL SECURITY BENEFITS SUBMITTED FOR A HEARING BY ADMINISTRATIVE LAW JUDGE ON JANUARY 31, 2003

1. The reason for my appeal is based on my belief that the determination made by the Social Security Administration (SSA) was based on wrong understanding of the circumstances at hand, the objective of the "WINDFALL" elimination and the true goal of the Social Security System(SSA). In addition, as I studied in depth their Notice of Reconsideration, dated April 8, 2002, I found errors in the calculations. This document is attached here as EXHIBIT 1.

2. My explanation here is based on the information I have at hand from Exhibit 1 as well as the only other SSA publication that I could obtain from SSA, which will be introduced later in the text. I could not get any free legal help and I can not afford to pay for legal help since my pension income is well below the poverty level in spite of the fact that I worked very hard all my life.

3. My understanding of the SSA is that it was initiated at a time when people worked hard all their lives and when they retired they were left with a very little pension to live on or, in many cases without any pension at all. The system was then initiated and designed to HELP PEOPLE LIVE BETTER after retirement with the highly paid earners helping the low paid counterparts.

But, it was not meant to be a handout or a welfare system. People were contributing part of their earnings to the system during their working years and getting a helping hand at retirement to LIVE BETTER. This is even advertised publicly by the SSA by posting big signs in their old offices reading "SOCIAL SECURITY HELPING PEOPLE TO LIVE BETTER FOR 65 YEARS". This helping philosophy is exercised by SSA in many situations such as giving individuals the choice of getting their social security benefits at age 62 or higher benefits at age 65. Also, SSA gives benefits to spouses without even contributing to the system and many other examples which can be found.

4. I am a naturalized United States citizen. I came to the United States of America in November 1959 with a B.S. degree and six years of experience in Engineering. I came here to satisfy my ambitions of further knowledge and brighter career fully aware of the hard work ahead of me to reestablish my....

....such as death, disability and may be others) number of years (elapsed years) to be met. These conditions have been applied to my social security covered earnings with the result that the SSA certifies that I contributed to the social security system for average monthly earnings of 1495.00 for 35 years or 1539 for 34 years or 1744 for 30 years, as the proper number of years should be. It is worth noting here that any of the three AIMs mentioned here meets the substantial earnings requirement referred to in the SSA publication attached here as Exhibit 2 for all their respective years. In fact, the total of the substantial earnings for the 35 years case is 132300 whereas my total social security covered earnings is 627985.50.

8. Concerning the so called "pension" which I am getting from the Navy, I have earned this "pension" in exactly the same way I earned my salary working for the Navy or private industry. I traded my skills for a salary. The so called Navy "pension" is not the same as the standard pension people generally talk about. The standard pension generally consists of a distribution of funds from a pot containing contributions as well as contributions from the entity that is holding the pot, i.e. the employer. The Navy "pension" is merely a savings plan with accumulated assets contributed only by the employee. I contributed about 7% (which is a considerable amount of money) of every check I earned working for the Navy. The Navy did not contribute a single penny. This system is not any different from the Thrift Savings Plan for Navy and all federal employees. This is also the same as so many other retirement enhancement vehicles whether it is a Roth CD, a Roth annuity, 401 (K), 401(b) ... etc. I went to work for the Navy because it presented me with an opportunity to broaden the scope of my technical career. At that time there was the Civil Service Retirement System of which I became a member automatically. There was no connection between this system and the social security system.

9. Concerning the social security benefits, I definitely earned the full amount calculated back in 1998 namely 781.70 or the equivalent number corresponding to the appropriate period of elapsed years. In reaching this number I already sacrificed a lot. I already paid a penalty for not being in the United States on my 22nd birthday as well as the years that I spent at Columbia University getting higher education. I, also, already paid a heavier penalty for earning uncovered social security wages for almost 9½ years and now, I am being asked to pay even more penalty for the same thing in spite of the fact that

Navy pension is nothing more than Navy regulated disbursment of my own savings.

10. Windfall is defined in Webster Dictionary as "unexpected....

Social Security
A Pension From Work Not Covered By Social Security

How It Affects Your Social Security Retirement Or Disability Benefits

If you work for an employer who doesn't withhold Social Security taxes, such as a government agency or an employer in another country, the pension you get based on that work may reduce your Social Security benefits. Your benefit can be reduced in one of two ways. One is called the "government pension offset" and applies only if you receive a government pension and are eligible for Social Security benefits as a spouse or widow(er). For more information on the offset, ask Social Security for the fact sheet, Government Pension Offset (Publication No. 05-10007).

The other way-Called the"windfall elimination provision"-affects how your retirement or disability benefits are figured if you receive a pension from work not covered by Social Security. The formula used to figure your benefit amount is modified, giving you a lower Social Security benefit. This factsheet explains the computation formula.

Who Is Affected?

This provision primarily affects people who earned a pension from working for a government agency,and also worked at other jobs where they paid Social Security

taxes long enough to qualify for retirement or disability benefits.It also may affect you if you earned a pension in any job where you didn't pay Social Security taxes, such as in a foreign country. The modified formula applies to you if you reach 62 or become disabled after1985 and first become eligible after 1985 for a monthly pension based in whole or in part on work where you did not pay Social Security taxes.You are considered eligible to receive a pension if you meet the requirements of the pension, even if you continue to work.

The modified formula is used to figure your Social Security benefit beginning with the first month you get both a Social Security benefit and the other pension.

Why Is A Different Formula Used?

Social Security benefit replace a percentage of a worker's pre-retirement earnings. The formula used to compute benefits includes factors that ensure lower-paid workers get a higher return than highly paid workers. For example, lower-paid workers could get a Social Security benefit that equals about 60 percent of their pre-retirement earnings.The average replacement rate for highly paid workers is about 25 percent.

Before 1983,benefit for people who spent time in jobs not covered by Social Security were computed as if they were long-term, low-wage workers. They received the advantage of the higher percentage benefits in addition to their other pension. The modified formula eliminates this windfall.

How Does It Work?

Social Security benefits are based on the worker's average monthly earnings adjusted for inflation. When we figure your benefits, we separate your average earnings into three amounts and multiply the amounts using three different factors. For example, for a worker who turns 62 in the year 2001, the first $561 of average monthly earnings is multiplied by 90 percent; the next $3,381 is multiplied by 32 percent; and the remainder by 15 percent.

The 90 percent factor is reduced in the modified formula and phased in for workers who reached age 62 or became disabled between 1986 and 1989. For those who reach 62 or become disabled in 1990 or later, the 90 percent factor is reduced to 40 percent. There are exceptions to this rule. For example, the 90 percent factor is not reduced if you have 30 or more years of "substantial" earnings in a job where you paid Social Security taxes. The first table on the back lists the amount of earnings we consider "substantial" for each year.

If you have 21 to 29 years of substantial earnings, the 90 percent factor is reduced to somewhere between 45 and 85 percent. The second table shows the percentage used depending on the number of years of "substantial earnings.

Some Exceptions

The modified formula does not apply to survivors benefits.It also does not apply to you if:

- you are a federal worker hired after December 31,1983;

- you were employed on December 31,1983, by a nonprofit organization that was exempt from Social Security and it became mandatorily covered under Social Security on that date;

- your only pension is based on railroad employment;

- your only work where you did not pay Social Security taxes was before 1957;or

- you have 30or more years of substantial earnings under Social Security (as explained earlier).

Year	Substantial Earnings				
1937-50	$ 900[2]	75	3525	84	7050
51-54	900	76	3825	85	7425
55-58	1050	77	4125	86	7875
59-65	1200	78	4425	87	8175
66-67	1650	79	4725	88	8400
68-71	1950	80	5100	89	8925
72	2250	81	5550	90	9525
73	2700	82	6075	91	10350
74	3300	83	6675	....etc	

[2]Total credited earnings from 1937-50 are divided by $900 to get the number of years of coverage (maximum of 14 years)

Years of Substantial Earnings	Percentage
30 or more	90 percent
29	85 percent
28	80 percent
27	75 percent

26	70 percent
25	65 percent

Years of Substantial Earnings	Percentage
24	60 percent
23	55 percent
22	50 percent
21	45 percent
20 or less	40 percent

Guarantee

Workers with relatively low pensions are protected because the reduction in the Social Security benefit under the modified formula cannot be more than one-half of that part of the pension attributable to earnings after 1956 not covered by Social Security.

For More Information

Visit....

Social Security Administration
SSA Publication No. 05-10045
March 2001(Recycle prior editions)
ICN 460275
Unit of Issue: HD(one hundred)

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB
146-34-0257

Office of Hearings
and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-
3255
Tel:(703)605-8000
Date: May 3,2005

NOTICE OF APPEALS COUNCIL DECISION
UNFAVORABLE

Mr.A.M.Elshinnawy
397 Stratford Avenue
Collegeville, PA 19426

The enclosed decision is the final decision of the Commissioner of Social Security in your case. Please read this notice and the decision carefully.

If You Disagree With This Decision

If you disagree with this decision, you may ask for court review by filing a civil action.

If you do not ask for court review, this decision will be a final decision that can be changed only under special rules.

How To File A Civil Action

You may file a civil action(ask for court review) by filing a complaint in the United States District Court for the judicial district in which you live.

The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this letter.

You or your representative must deliver copies of your complaint and of the summons issued by the court to the U.S. Attorney for the juducial district where you file your complaint,as provided in rule 4(i) of the Federal Rules of Civil Procedure.

You or your representative must also send copies of the complaint and summons, by certified or registered main, to:

The General Council
Social Security Administration
Room 617 Altmeyer Building
6401 Security Boulevard
Baltimore, MD 21235

And:

The Attorney General of the United States
Washington, DC 20530

Time To File A Civil Action

- You have 60 days to file a civil action (ask for court review).

- The 60 days start the day after you receive this letter. We assume you received this letter 5 days after the date on it unless yoy show us that you did not receive it within the 5-day period.

- If you cannot file for court review within 60 days,you may ask the Appeals Council to extend the time to file. You must have a good reason for waiting more than 60 days to ask for court review. You must make the request in writing and give your reason(s) in the request.

You must mail your request for more time to the Appeals council at the address shown at the top of this notice. Please put the Social Security number(s) also shown at the top of this notice on your request. We will send you a letter telling you whether your request for more time has been granted.

About The Law

The right to court review for claims under Title II(Social Security)is provided for in Section 205(g) of Social Security Act. This section is also Section 405(g) of Title42 of the United States Code.

The right to court review for claims under Title XVI (Supplemental Security Income) is provided for in Sectio 1631 (c)(3)of the Social Security Act. This section is also Section 1383(3)of Title 42 of the United States Code.

The rules on filing civil actions are Rules 4(c)and(i) in the Federal Rules of Civil Procedure.

If You Have Any Questions

If you have any questions,you may call, write, or visit any Social Security office. If you do call or visit an office,please have this notice with you. The telephone number of the local office that serves your area is 610-431-0529. Its address is:

1101 West Chester Pike
West Chester, PA 19382-5004

The staff there will be able to assist you.

Peter N. Dowd
Administrative Appeals Judge

Enclosure(s)

cc:
Richard Bateman
Attorney at Law
111 North Olive Street
Media, PA 19063

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF THE APPEALS COUNCIL

In the case of	**Claim for**
A.M.Elshinnawy (Claimant)	Old-Age Insurance Benefits
_____ (Wage Earner) (Leave Blank if same as above)	146-34-0257

This case is before the Appeals Council on the claimant's request for review of the Administrative Law Judge's decision issued on November5,2004.The Appeals Council granted the request for review under the substantial evidence provision of 20CFR404.970,and notified the claimant and his representative of its proposed action and of his rights with respect thereto,on March7, 2005. The Council received a response from the claimant dated March29,2005.In his response,the claimant requested an opportunity for an appearance before the Council.

The Appeals Council will grant a request for an appearance in accordance with 20CFR 404.976(c) when the Council decides that a case raises an immportant queestion of law or policy or that oral argument would help to reach a proper decision.The Council has concluded that no important question of law or policy is presented in this case. The issues raised are limited to findings of facts based on the evidence of record and in the Council's opinion oral argument is not required to reach a proper decision. The Council therefore denies the request for an appearance. The Council has, however, considered

arguments the claimant submitted with his request for an appearance.

In his decision,the Administrative Law Judge held that the claimant received an overpayment of $5,791,and that recovery was not waived because the claimant was not without fault in causing the overpayment.

The Appeals Council incorporates the Administrative Law Judge's statemenrt of the evidence in this case, and his references to provisions of the Social Security Act and the regulations of the Social Security Administration, as supplemented below.

ISSUES

The issues before the Appeals Council are whether the Social Security Administration applied the provisions of the windfall elimination provision correctly,whethher the claimant received an overpayment, and whether recovery may be waived.

After considering all the evidence of record, the Appeals Council has concluded that the Social Security Administration correctly applied the windfall elimination provision, that the claimant received an overpayment and that recovery of the overpayment is not waived.

EVIDENCE CONSIDERED

In addition to the recod before the Administrative Law Judge,the Appeals Council has considered and entered into the record the following information:

Exhibit AC-1 A letter from the claimant ton the Appeals Council dated December 22,2004, with

attachments

Exhibit AC-2 A copy of the Appeals Council's notice to the claimant dated March 7,2005

Exhibit AC-3 A letter from the claimant to the Appeals Council dated March 29,2005, with attachments

EVALUATION OF THE EVIDENCE

The claimant who was born on February 1,1933, filed an application for old-age insurance benefits on November 12,1997. He indicated that he expected to become entitled to a pension based upon noncovered employment beginning January 1998. In the remarks section of this application, the claimant indicated that:

> I understand that the my civil service pension will offset my Social Security benefit, and I agree to notify Social Security as soon as I know what my pension amount is so as to avoid any overpayment from Social Security.

This statement is above the claimant's signature on the application (Exhibit 1).

The claimant became entitled to old-age insurance benefits effective January 1998. On or about June 26,1998,the claimant reported his receipt of his civil service annuity, which was effective February1,1995,and paid in February 1998 (Exhibit 22).

The Social Security Administration recomputed the claimant's benefits under the windfall elimination

provision(WEP) and determined that his benefits were subject to reduction and that he had received an overpayment of $5,791. The claimant requested that this determination be reconsidered and that recovery of the overpayment be waived.In his waiver request, the claimant declined to provide any financial information (Exhibits 2,3 and 5). Upon reconsideration, the Administration provided a detailed explanation for its determination that the windfall elimination provision applies in this case,as well as a detailed explanation of the computation of the overpayment of $5,791 (Exhibit 6). The Administration indicated it was prepared to determine that recovery of the overpayment would not be waived (Exhibit7). The claimant filed a request for hearing (Exhibit 8). The claimant contended that the windfall elimination was both applied and computed incorrectly (Exhibit 13).

In his decision of November 5,2004, the Administrative Law Judge held that the claimant did not report his receipt of his civil servvice pension timely. Although the copy of the civil service award notice located at Exhibit 22 is date-stamped June 26,1998, the Administrative Law Judge concluded that the Social Security Administration did not rceive such notification until February 2003 (Exhibit 22).

From its review of the evidentiary record, the Appeals Council finds that this finding is erroneous and not supported by the evidenntiary record. The date-stamp on the reverse of the civil service award notice is a certification by K. Rowland, an employee in the local Social Security office, as to the authenticity of the photocopy of the original document. This shows that Ms. Rowlands received the document on June 26,1998. This

document was sent to the mid-Atlantic Program Service Center on or about the same day (Exhibit22).

However, the Appeals Council finds that the claimant did not report his civil service annuity properly. At the oral hearing, the claimant indicated that there was an issue with his civil service pension which was that, althoughh he did not file for such pension until 1998, he was eligible to receipt such pension at age 62, and he did not contact the Administration until the issues regarding his month of eligibility and payment were fully resolved.The reward notice indicates that the claimannt received a pension payment as early as February 1995,based on the following language:

YOUR FINAL **INTERIM PAYMENT** WAS/WILL BE SENT TO YOU ON: **FEBRUARY 1,1998** (Exhibit 22)

The Council finds that the claimant received payments prior to June 1998 when he submitted the award form. Because the claimant did not report the interim payment[s], the Council finds that the claimant failed to report information which he knew or should have known to be material(20CFR404.507(b)).

Further, the Appeals Council finds that the claimant was not without fault in causing the overpayment because he accepted benefits he knew or should have known to be incorrect. On his application for old-age insurance benefits, the claimant acknowledged that his receipt of the civil service pension could cause an overpayment in his Social Security benefits.The claimant testified that when he submitted the civil service pension award notice, the Social Security employee told him that he would hear something in a couple of months. However, there is no indication that the claimant contacted the Administration

or otherwise questioned why his benefits had not changed (20CFR 404.507(c)).Because the claimant was not without fault in causing the overpayment,the Appeals Council finds that recovery of the overpayment is not waived (20CFR 404.506).

In requesting review,the claimamt contended that the Administration used an incorrect monthly divisor of 420 (35 years times 12),based upon 40 elapsed years of employment less 5 years, to compute his monthly benefits. The claimant contended that, based upon the formula provided in the reconsidered determination on page 3 of Exhibit 6, he should only have 39 elapsed years for a monthly divisor of 408. Although the claimant's interpretation of section 215(b)(1)(B) of the Act as shown in Exhibit 6 is correct,the section,as cited in this determination, contains a significant typographical error. Exhibit 6 reads as follows, as pertinent herrein, emphasis added:

> Section 215(b)(2)(B)of the Act provides that the term "elapsed years" means the number of calendar years after 1950 (or, if later, after the year of attainment of ***age 22***) and before the year in which the worker died, became disabled or attained age 62.

This provision of the Act should read:

> Section 215(b)(2)(B) of the act provides that the term "elapsed years" means the number of calendar years after 1950 (or, if later, after the year of attainment of ***age 21***) and before the year in which the worker died, became disabled or atained age 62.

Accordingly,the Council has concluded that the benefit computation using 40 elapsed years and 35 computational years is correct.

Also in requesting review, the claimant repeated his prior contention that it is not necessary to submit information regarding his expenses in order to show that recovery of the overpayment would defeat the purpose of Title IIof the Social Security Act. The Appeals Council does not find his contention persuasive.

Recovery would defeat the purpose of Title II of the Social Security Act if it would deprive an individual of income required for ordinary and necessary living expenses. This depends upon whether the individual has an income or has financial resources sufficient for more than ordinary and necessary needs,or is dependent upon all of his current benefits for such needs. Adjustment or recovery will defeat the purpose of Title II of the Act in situations where the individual from whom recovery is sought needs substantially all of his current income to meet current ordinary and necessary living expenses (20CFR 404.508). In determing whether recovery of an overpayment would defeat the purpose of Title II of the Act, the income, expenses and assets of the entire household are considered (Social Security Ruling 74-28)

Because the claimant was not without fault in causing the overpayment,recovery may not be waived from the claimant regardless of his financial circumstances. However,in order to address whether recovery of an overpayment would defeat the purpose of Title II of the Social Securitty Act, the total income,expenses and assets for the entire household must be evaluated in order to determine the household's ordinary and necessary liiving expenses, as well as the amount of income

neccessary to support such expenses. The Council observes that, on the claimant's application for old-age insurance benefits, he indicated that he was married and living with his wife,Arlene J. Elshinnawy. If an evaluation of the claimant's financial situation were necessary, not only would information regarding his income,assets and household expenses have to be submitted,but similar information regarding Ms. Elshinnawy would also have to be submitted.

Finally, in requesting review, it appears that the claimant contended that he did not receive a fair hearing and/or decision from the Administrative Law Judge.The Appeals Council thoroughly reviewed the evidentiary record, including an audit of the tape recording made of the hearing held on October 18,2004, and found that the Administratve Law Judge conducted the hearing in a professional manner and afforded the claimant and his representative ample opportunity to submmit additional information and/or testimony regarding the issues before him. The Council finds no merit in this contention.

The claimant also contends that the Council's statement that Ms. Rowlands received his report of his civil service annuity on June 26,1998 is erroneous because he submitted it to her on June 24, 1998 but she failed to stamp it as received until June 26,1998. The Council finds that this does not provide a basis for revision of the not without fault finding because the 2-day difference is not material.

The claimant contended that his June 1998 report was filed timely because, when he received the notification of his civil service annuity, as well as the payment(s), in February 1998, he did not know whether his annuity had been computed property and chose not to report the

receipt of the annuity until he determined that it was correct. Further, he contended that he fulfilled his reporting obligation to the Social Security Administration by making the one report to his local Social Security office and that the overpayemtn was caused by the Administration's delay in acting upon such report. The Appeals Councel does not find these contentions persuasive. Although the Social Security Administration may have contributed to cuasing the overpayment, that fact does not relieve the overpaid individual from liability for repayment if such individual is not without fault (20 CFR 404.507). Further, by failing to report his receipt of the civil service annuity in February 1998, the claimant did not act in a timely manner to prevent the occurance of an overpayment (20 CFR 404.507(b)). Further, by not questinging why he had not received a response to his report of his civil service annuity after being informed, in connection with his initial application, that such receipt could cuase an overpayment, and that, upon making the report, he would receive a response within a couple of months, the claimant received benefits he knew or should have known were incorrect (20 CFR 404.507(c)).

The claimant contends that he is without fault in cuasing the overpayment under 20 CFR 404.510(e) and that receover should be waived under 20 CFR 404.512(b). The Appeals Council does not find this contention persuasive because those regulations pertain to waiver of recovery of deduction overpayments, i.e., overpayments caused by excess earned income. The overpayment at issue in this case is an entitlement overpayment and not a deduction overpayment (20 CFR 404.402(a)).

The claimant contended that he should be allowed a reduction in the number of computational years used in computing his primary insurance amount and his old-age

insurance benefits because he did not enter the United States until 1959 when he was 26 years of age and he was a college student until 1964 when he was able to enter the work force. The claimant contended that tehse years during which he was unable to work should be removed from the computational years. The Council finds that there is no statutory or regulatory authority to grant this request.

FINDINGS

After careful consideration of the evidence of record, the Appeals Council makes the following findings:

1. The Social Security Administration correctly applied the windfall eliminaition provision in determining the claimant's old-age insurance benefits.

2. The Social Security Administration correctly computed the claimant's monthly old-age insurance benefits using 40 elapsed years and 35 computational years.

3. The claimaint was not without fault in cuasing overpayment.

4. Recovery of the overpayment is not waived.

DECISION

It is the decision of the Appeals Council that the Social Security Administration correctly applied the windfall climiniation provision, that the claimant received an overpayment and that recovery of the overpayment is not

waived. The decision of the Administrative Law Judge is so modified.

APPEALS COUNCIL

ORIGINAL SIGNED BY
Peter N. Dowd
Administrative Appeals Judge

ORIGINAL SIGNED BY
Thomasine B. Carter
Administrative Appeals Judge

Date: May 3-2005

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB
146-34-0257

Office of Hearings
and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-
3255
Tel:(703)605-8000
Date: March 7, 2005

NOTICE OF APPEALS COUNCIL ACTION

A.M.Elshinnawy
397 Stratford Avenue
Collegeville, PA 19426

This is about your request for review of the Administrative Law Judge's decision dated November 5, 2004.

We have Granted Your Request for Review

The Appeals Counsel is reviewing the Adminstrative Law Judge's decision.

Rules We Applied

Under our rules, we will review your case for any of the following reasons.

- The Administrative Law Judge appears to have abused his or her discretion.

- There is an error of law.
- The decision is not supported by substantial evidence.
- There is a broad policy or procedural issue that may affect the public interest.
- We receive new and material evidence and the decision is contrary to the weight of all the evidence now in the record.

In your case we found that the decision is not supported by substantial evidence.

What We Considered

We considered the written record that was before the Adminsitrative Law Judge and the testimony at the hearing.

What We Plan To Do

We plan to make a decision finding:

1. The Social Security Administration correctly computed your monthly old-age insurance benefits using 40 elapsed years and 35 computational years.
2. You are not without fault in causing the overpayment.
3. Recovery of the overpayment is not waived.

Why We Are Taking This Action

In his decision, the Administrative Law Judge held that you did nto report your receipt of your civil service pension timely. Although the copy of the civil service award notice located at Exhibit 22 is date-stamped June 26, 1998, the Administrative Law Judge concluded that the Social Security Administration did not receive such notification until February 2003 (Exhibit 22).

From its review of the evidentiary record, the Appeals Council is prepared to find that this finding is erroneous and not supported by the evidentiary record. The date-stamp on the reverse of the civil service award notice is a certification by K. Rowlands, an employee in the local Social Security office, as to the authenticity of the photocopy of the original docment. This shows that Ms. Rowlands received the document on June 26, 1998. This document was sent to the Mid-Atlantic Program Service Center on about the same day (Exhibit 22).

However the Appeals Council is prepared to find that you did not report your civil service annuity properly. At the oral hearing, you indicated that there was an issue with your civil service pension which was that, although you did not file for such pension until 1998, you were eligible to receipt such pension at age 62, and you did not contact the Administration until the issues regarding your month of eligibility and payment were fully resolved. The award notice indicates that you received a pension payment as early as February 1995, based on the following language:

YOUR FINAL **INTERIM PAYMENT** WAS/WILL BE SENT TO YOU ON: **FEBRUARY 1,1998**

The Council is prepared to find that you received payments prior to June 1998 when you submitted the award form. Because you did not report the interim payments, the Council is prepared to find that you failed to report information which you knew or should have known to be material (20 CFR 404.507(b)).

Further, the Appeals Council is prepared to find that you were also not without fault in causing the overpayment because you accepted benefits you knew or should have known to be incorrect. On your application for old-age insurance benefits, you acknowledged that your receipt of the civil service pension could cause an overpayment in your Social Security benefits. You testified that when you submitted the civil service pension award notice, the Social Security employee told you that you would hear something in a couple of months. However, there is no indication that you contacted the Administration or otherwise questioned why your benefits had not changed (20CFR 404.507(c)).

Absent new and material evidence or pertinent legal argument, the Appeals Council is prepared to find that you were nto without fault in causing the overpayment and that its recovery may not be waived (20CFR 404.506).

In requesting review, you contended that the Administration used an incorrect monthly divisor of 420 (35 years times 12), based upon 40 elapsed years of employment less 5 years, to compute your monthly benefits. You contended that, based upon the formula provided in the reconsidered determination on page 3 of Exhibit 6, you should only have 39 elapsed years for a monthly divisor of 408. Although your interpretation of section 215(b)(1)(B) of the Act as shown in Exhibit 6 is

correct,the section,as cited in this determination, contains a significant typographical error. Exhibit 6 reads as follows, as pertinent herrein, emphasis added:

> Section 215(b)(2)(B)of the Act provides that the term "elapsed years" means the number of calendar years after 1950 (or, if later, after the year of attainment of ***age 22***) and before the year in which the worker died, became disabled or attained age 62.

This provision of the Act should read:

> Section 215(b)(2)(B) of the act provides that the term "elapsed years" means the number of calendar years after 1950 (or, if later, after the year of attainment of ***age 21***) and before the year in which the worker died, became disabled or atained age 62.

Accordingly,the Council has concluded that the benefit computation using 40 elapsed years and 35 computational years is correct.

Also in requesting review, you repeated your prior contention that it is not necessary to submit information regarding your expenses in order to show that recovery of the overpayment would defeat the purpose of Title II of the Social Security Act. The Appeals Council does not find his contention persuasive.

Recovery would defeat the purpose of Title II of the Social Security Act if it would deprive an individual of income required for ordinary and necessary living expenses. This depends upon whether the individual has an income or has financial resources sufficient for more than ordinary and necessary needs,or is

dependent upon all of his current benefits for such needs. Adjustment or recovery will defeat the purpose of Title II of the Act in situations where the individual from whom recovery is sought needs substantially all of his current income to meet current ordinary and necessary living expenses (20CFR 404.508). In determing whether recovery of an overpayment would defeat the purpose of Title II of the Act, the income, expenses and assets of the entire household are considered (Social Security Ruling 74-28)

Because you are not without fault in causing the overpayment, recovery may not be waived regardless of your financial circumstances. However,in order to address whether recovery of an overpayment would defeat the purpose of Title II of the Social Security Act, the total income,expenses and assets for the entire household must be evaluated in order to determine the household's ordinary and necessary liiving expenses, as well as the amount of income neccessary to support such expenses. The Council observes that, on your application for old-age insurance benefits, you indicated that you were married and living with your wife,Arlene J. Elshinnawy. If an evaluation of your financial situation were necessary, not only would information regarding your income,assets and household expenses have to be submitted,but similar information regarding Ms. Elshinnawy would also have to be submitted.

Finally,in requesting review, it appears that you contended that you did not receive a fair hearing and/or decision from the Administrative Law Judge.The Appeals Council thoroughly reviewed the evidentiary record, including an audit of the tape recording made of the hearing held on October 18,2004, and found that the Administratve Law Judge conducted the hearing in a

professional manner and afforded you and you representative ample opportunity to submit additional information and/or testimony regarding the issues before him. The Council finds no merit in this contention.

You May Send More information

You may send us more evidence or a statement about the facts and the law in your case within 30 days of the date of this letter.

We will consider more evidence if:

- It is new material

AND

- It is about whether recovery of your overpayment of $5,791 in old-age insurance benefits may be waived.

You May Ask For An Appearance

You may ask for an appearance before the Appeals Council to tell us about your case. You may tell us in writing within 30 days from the date of this letter why you want an appearance.

Under our rules, we will give you an appearance if:

- There is an important question of law or policy;

OR

- Oral argument would help us reach a proper decision.

If we decide to give you an appearance, we will notify you about the time and place at least 10 days before the date scheduled for your appearance.

We Will Not Act for 30 Days

If you have more information, you must send it to us within 30 days of the date of this letter.

Our address and FAX number are:

ADDRESS: Appeals Council
Office of Hearings and Appeals
ATTN: Branch 21, Suite 1407
5107 Leesburg Pike
Falls Church, VA 22041-3255

FAX: 703-605-7101, Attn.: Branch 21

Put the Social Security Number shown at the top of this letter on your request.

If you send us anything by fax, do not send duplicates by mail. This may delay processing your claim.

What Happens Next

If we do not hear from you within 30 days, we will assume that you do not want to send us more information or appeal before the Appeals Council. We will then make our decision.

If You Have any Questions

If you have any questions, you may call or write the Appeals Council. Our telephone number and address are shown at the top of this letter. If you do call, please have this notice with you.

/s/
Peter N. Dowd
Administrative Appeals Judge

/s/
Thomasine B. Carter
Administrative Appeals Judge

Enclosure(s):
Self-addressed envelope

cc:
Richard Bateman
Attorney at Law
111 North Olive Street
Media, PA 19063

SOCIAL SECURITY ADMINISTRATION
Refer to:146-34-0257 Exhibit 1

Office of Hearings and Appeals
OHA Hearing Office,SSA
Suite 250
8330 Old York Road
Elkins Park, PA 19027
Date: 05 NOV 2004

A.M. Elshinnawy
397 Stratford Avenue
Collegeville, PA 19426

NOTICE OF DECISION - UNFAVORABLE

I have made the enclosed decision in your case.Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request that the Appeals Council review the decision. You must make the request in writing.You may use our Request for Review form,HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office.You may also mail your request right to the Appeals Council, Office of

Hearings and Appeals,5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within 60 days from the date you get this notice.

The Appeals council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period.The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time to Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal,the Council will consider all of my decision, even the parts with which you agree. The Council may review your case for any reason. It will review your case if one of the reasons for

review listed in our regulations exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council May Review The Decision On Its Own

The Appeals Council can review my decision even without your request to do so. If it decides to do that, the Council will mail you a notice about its review within 60days of the date of this notice.

If No Appeal And No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision.If you disagree with my decision and you file a new application instead of appealing,you might lose some benefits, or not

qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security off ice. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (610)431-0529. Its address is 330 West Market Street, West Chester, PA 19382.

Henry Oliver
Administrative Law Judge

Enclosures
cc: Richard Bateman
111 North Olive Street
Media, PA 19063

SOCIAL SECURITY ADMINISRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
	Retirement Survivors Insurance Benefit (Application of Windfall Elimination Provision and Overpayment)
A.M.Elshinnawy (Claimant)	
_____ (Wage Earner)	146-34-0257 (Social Security Number)

INTRODUCTION

The claimant filed an application for Retirement Insurance Benefits on November 12,1997 (Exhibit 1). At that time, he acknowledged that he would be receiving a civil service pension and that he was aware of the fact that receipt of such pension would act as an offset against his retirement insurance benefits. He agreed to advise the SSA "as soon as I know what my pension amount is so as to avoid any overpayment from Social Security"(Exhibit 1).The claimant was awarded entitlement to SSA Retirement Insurance Benefits (RSI) beginning January1998 and also began receiving civil service pension benefits, which should have acted as an offset against his RSI payments. No such offset was taken. Accordingly, the claimant was overpaid in the amount of $5,791 prior to the time that SSA became aware of the problem and he was so advised on February 14, 2000.

The claimant then filed a timely request for hearing on June 7,2000. A hearing was convened on January 31,2003,

at which the claimant requested a postponement,to allow him to obtain an attorney,and this request was granted. The hearing was reconvened on May7,2003,in Elkins Park, PA,at which time the claimant knowingly waived his right to representation. The claimant submitted a brief, which was admitted into the record as Exhibit 13.A decision was issued dated May27,2003, finding that the claimant had been overpaid $5,791,and that the claimant was not "without fault" in incurring or receiving the overpayment, therefore waiver of recovery of the overpayment could not be made (Exhibit 15).

The claimant filed a Request for Review with the Appeals Council(Exhibit 16). By order dated February 9,2004, the Appeals Council remanded this case for further consideration of the case, and to enter into the record the claimant's letter of June 27, 2003, with attachments, and the "postadjudicative routing" form dated June 26,1998, with attachment.he Administrative Law Judge was to have the claimant submit either a fully completed "request for waiver of overpayment recovery or change in repayment rate" or an explanation as to why he declined to submit such a form. The Administrative Law Judge was also to provide the claimant an opportunity to review the evidentiary record and to submit additional information and/or testimony. The Administrative Law Judge was also to make findings and a determination as to whether the SSA applied the windfall elimination provision correctly, whether the claimant was receiving the highest possible old-age insurance benefits to which he was entitled, and whether the claimant received an overpayment. If the claimant received an overpayment, the Administrative Law Judge was to make findings regarding whether the claimant was without fault in causing or receiving the overpayment; and, if necessary,whether recovery would either defeat the purpose of

Title II of the Act,or be against equity and good conscience. The Appeals Council also stated that another oral hearing would be held, at which the claimant could submit additional evidence and testimony (Exhibit 17).

On remand, the claimant's earnings records were entered into the record(Exhibits19-21). Also admitted into the record was an explanation of the claimant's annuity adjustment payment(Exhibit22).The claimant also submitted a brief, which has been entered into the record as Exhibit23. He also submitted a letter outlining the issues in the case, which has been entered into the record as Exhibit25. A notice from the SSA dated May 3, 2000, which informed the claimant of his change in benefits was entered into the record as Exhibit 26.The claimant also submitted a letter regarding his income and expenses, which has been entered into the record as Exhibit26. A supplemental hearing was held on October 18,2004,at which the claimant appeared and testified, represented by his attorney, Richard Bateman, Jr., Esq.

LAW AND REGULATIONS

The Social Security Amendments of 1983 (P.L.98-21) includes a provision that eliminates "windfall" Social Security benefits for retired and disabled workers receiving pensions from employment not covered by Social Security. Under this provision, a modified benefit formula is used to determine the number holder's primary insurance amount (PIA). The revised benefit formula eliminates the windfall in benefits for individuals who have only minmimal Social Security coverage and will receive a pension based on years of work in non-covered employment. The windfall offset prevents a person from receiving more benefits retroactively than would have been received if all benefits were paid in the months they

were due. A worker's PIA will never be reduced by more than one-half of his or her pension from non-covered employment.

Social Security benefits are based on the monthly average of lifetime earnings. In the basic formula for figuring benefits, the first part of the average earnings is multiplied by 90 percent; the second part is multiplied by 32 percent; and any part of the average monthly wage remaining is multiplied by 15 percent. However, under the windfall elimination provision,the 90 percent factor is replaced by a factor ranging from 50 to 80 percent for workers who reached age 62or became disabled between 1986 and 1989.For those who reach age 62 or become disabled in1990 or later,the 90 percent factor is replaced by a factor ranging from 85 to 40 percent depending on the number of years of "substantial" earnings the number holder has.

A pension is a periodic payment from an employer's primary retirement or disability plan, based on employer and/or employee contributions, and based on eligibility factors such as age, length of service, or earnings. For a pension to invoke the windfall elimination provision, the payment must be based on earnings for service that was not covered by Social Security.

With regard to the issue of overpayment, Section 204(b) of the Social Security Act provides that there shall be no adjustment or recovery in any case where an overpayment under Title II has been made to an individual who is without fault,if adjustment or recovery would either defeat the purpose of Title II of the Act, or be against equity and good conscience (20CFR404.506).

A determination of "fault" applies only to the individual.

Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault.In determining whether an individual is "without fault,"the Social Security Administration will consider all pertinent circumstances, including the individual's age and intelligence, and any physical, mental, educational, or liguistic limitations (including any lack of facility with the English language). What constitutes "fault" on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under Section 1814(e) resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect;

(b) Failure to furnish information which he knew or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of payment which he either knew or should have been expected to know was incorrect.(20CFR404.507).

"Defeat the purpose of Title II" means to defeat the purpose of benefits,or to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current

benefits for such needs. An adjustment or recovery would defeat the purpose of TitleII in situations where the person from whom recovery is sought needs substantially all of his current income (including Social Security benefits) to meet current ordinary and necessary living expenses (20CFR 404.508).

Recovery of an overpayment is"against equity and good conscience"if an individual:

(1) Changed his or her position for the worse,or relinquished a valuable right because of reliance upon a notice that a payment would be made or because of the overpayment itself;or

(2) Was living in a separate household from the overpaid person at the time of the overpayment, and did not rceive the overpayment.

The individuals's financial circumstances are not material to a finding of against equity and good conscience.

EVALUATION OF THE EVIDENCE

The claimant testified at the supplemental hearing, that he applied for Social Seccurity Retirement benefits before he applied for his pension.His contention that he was not told that his pension would affect his Social Security retirement benefit is not supported by the record.At the time the claimant filed for retirement benefits he stated that he did not know the amount of his civil service pension. His application noted that he agreedd to notify SSA of the amount of his civil service pension,and he acknowledged that the civil service pension would offset his Social Security benefits (Exhibit 1). The claimant has reported that he informed SSA of his pension from the

Navy in June1998 (Exhibits 2 and 23). The record indicates that if he informed SSA of the pension,it was only done verbally. There is no evidence that he submitted any documentation concerning the pension, at the time his retiremcent benefits were calculated and paid, for the period at issue (Exhibit3).He has now submitted a copy of a notice of his annuity payments from 1995-1997,and the document is stamped as having been received on June 26,1998,but there is no evidence that thisd document was submitted at the time. The postadjudicative routing form indicates that it was received in February 2003 (Exhibit 22).

The reconsideration determination dated April 8, 2002, contains an independent, detailed calculation of the claimant's PIA, and his benefit calculation pursuant to the modified formula under the windfall elimination provisions. Pursuant to this calculation, the claimant was overpaid $5,791 (Exhibit 6). The claimant submitted arguments at that time, indicating his disagreement with the application of the windfall eliminiation provisions, and his displeasure with the resulting amount of his benefits, but he never submitted any evidence that the provisions were incorrectly applied (Exhibit 5). He also disagrees with the application of the statutory provision sfor individuals who came to the United States in adulthood, and, therefore, have limited earnings on their Social Security records (Exhibit 12F). The claimant's disagreement with the statute and the implementing regulations is not relevant to this evaluation.

The evidence shows that the Social Security records considered at recomsideration accurately reflect his pension payments. The record shows the discrepancy between what he was paid, and the correct benefit due, from January 1998 through March 2000. The claimant

has not submitted any evidence to show that the records were incorrect, or that the calculation was not done correctly. He essentially maintains that he disagrees with the concept of having his benefits reduced, and is not satisfied with his retirement income. The record supports a finding that the windfall elimination provision was correctly applied in this case, and that his PIA calculation is correct, after the application of the windfall elimination provision.

Accordingly, the claimant's benefit calculation is correct, and he is receiving the highest benefit payment to which he is entitled, based on his earnings. In addition, the determination that he was overpaid $5,791 is also correct.

The next part of the evaluation is to determine if waiver of recovery of the oerpayment can be granted. The first part of the evaluation is a determination as to whether the claimant was "without fault' in causing or accepting the overpayment. As discussed above, the record dos not establish that the claimant timely submitted documentation regarding his receipt of pension benefits, although he was advised to do so when he applied for his Social Security retirmenet benefits. The claimant timely submitted documentation regarding his receipt of pension benefits, although he was advised to do so when he applied for his Social Security retirmenet benefits. The claimant reported that he has a doctorate degree in Engineering, and he worked in a professional cacpacity for many years (Exhibit 12). His extensive correspondence and briefs show that he is an intelligent and articulate person, fully capable of understanding and meeting his reporting responsibilities. Accordingly, the claimant cannot be found to be completely "without fault" in causing or accepting an overpayment of benefits.

The claimant has reported that his income, from his Social Security benefits and pension, prior to the deduction made to repay the overpayment, was $1,300 a month, and he now only receives about $1,000 a month. He has not submitted an itemized list of his expenses, rent and mortgage, groceries, utilities, etc., but only states that his income is at the poverty level (Exhibit 26). Because the claimant is not "without fault" in causing or receiving the overpayment, however, we do not proceed to a determination as to whether his income is sufficient to meet his ordinary and necessary living expenses.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The windfall elimination provision of the Act was appropriately applied in detrmining the claimant's retirement benefits.

2. The claimant was properly charged with an overpayment in the amount of $5,791.

3. Waiver of recovery of the overpayment is not appropriate, because the claimant was not "without fault" in causing or accepting the overpayment.

DECISION

It is the decision of the Administrative Law Judge that the windfall elimination provision of the Act was appropriately applied in determining the claimant's retirement benefits. It is the further determination of the Administrative Law Judge that the claimant was overpaid

$5,791 and that recovery of the overpayment cannot be waived.

/s/
Henry Oliver
Administrative Law Judge

05 NOV 2004

EXHIBIT LIST (RSI)

Claimant: A. M. Elshinnawy SSN: 146-34-0257

No.	DESCRIPTION	PAGES
1	Application for Retirement Insurance Benefits filed 11/12/97	3
2	Request for Waiver of Overpayment Recovery or Change in Repaymetn Rate dated 7/11/00	8
3	Report of Contact RE: Waiver Determination dated 7/11/00	2
4	Letter dated 8/3/00 RE: Overpayment of $5791.00	1
5	Request for Reconsideration, filed 8/16/00	2
6	Social Secuity Notice of Reconsideration filed 4/8/02 (Reconsideration Determination)	6
7	Letter dated 5/2/02 RE: Reconsideration Denial	2
8	Request for Hearing, filed 6/7/02	3
9	Acknowledgement letter for receipt of Request for Hearing dated 6/18/02	
10	Earnings record	4

MEDICAL RECORDS

Exh. No.	Part No.	Description	No. of Pages
11	F	Notice of Hearing dated 11/25/02	5
12	F	Explanation of the Reasons for Appealing Social Security Decision dated 1/24/03	4
13	F	Sequence of Testimony in Social Security Hearing	4

		on 5/7/03 Submitted by Claimant	
14	F	Letter Brief dated 5/28/03 Submitted by Claimant	7
15	F	Notice of Decision – Unfavorable dated 5/27/03	6

EXHIBITS ADMITTED IN CONNECTION WITH APPEALS COUNCIL REMAND

Exh. No.	Part No.	Description	No. of Pages
16	F	Request for Review of Hearing Decision/Order dated 6/30/03	2
17	F	Notice of Order of Appeals Council Remanding Case to Administrative Law Judge dated 2/9/04	4
18	F	Acknowledgemetn Letter to Appeals Council Remand Order dated 2/19/04	5
19	F	SEQY Query	1
20	F	DEQY Query	4
21	F	Earnings Record	3
22	F	Postadjudicative Routing Form & Explanation of Annuity Adjustment Payment dated 6/26/98	2
23	F	Letter Brief dated 6/27/03 from Claimant Appealing Decision by Administrative Law Judge	10

24	F	Notice of Hearing dated 8/13/04	6
25	F	Report dated 9/14/04 from the claimant A. M. Elshinnawy	
26	F	List of Income & Expense and Notice of Change in Benefits dated 10/25/04 from A.M. Elshinnawy	

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB
146-34-0257

Office of Hearings
and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-
3255
Tel:(703)605-8000
Date: Feb – 9, 2004

NOTICE OF ORDER OF APPEALS COUNCIL REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

Mr. A.M. Elshinnawy
397 Stratford Avenue
Collegeville, PA 19426

What This Order Means

We have sent your case back to an Administrative Law Judge. In the enclosed order, we explain why we did this and what the Administrative Law Judge will do about your claim.

In addition to what we ordered the Administrative Law Judge to do, the Administrative Law Judge may also do anything else needed to complete the claim.

What Happens Next

An Administrative Law Judge will contact you to tell you what you need to do.

APPENDIX I

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you do call or visit an office, please have this notice with you. The telephone number of the local office that serves your area is 610-277-0440. Its address is:

1700 Markley Street
Norristown, PA 19401

Peter N. Dowd
Administrative Appeals Judge

cc:

RCALJ, Philadelphia, PA

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In The Case Of	**Claim For**
	Old-Age
A.M.Elshinnawy	Insurance Benefits
(Claimant)	
_____	146-34-0257
(Wage Earner)	(Social Security Number)

The Administrative Law Judge issued a decision on May 27, 2003. The claimant has asked the Appeals Council to review this decision.

The Appeals Council grants the request for review under the new and material evidence provision of the Social Security Administration regulations (20 CFR 404.970). Under authority of 20 CFR 404.977, the Appeals Council vacates the hearing decision and remands this case to an Administrative Law Judge for further proceedings, including a supplemental hearing and a new decision.

In his decision, the Administrative Law Judgeheld that the Social Security Administration applied the windfall elimination provision (WEP) in this case correctly; that the claimant received an overpayment of $5,791 in old-age insurance benefits, and that recovery of the overpayment was not waived. In denying waiver of recovery of the overpayment, the Administrative Law Judge reasned that the claimant had not submitted information which

supported his contention that he reported his receipt of the civil service annuity timely.

On November 12, 1997, the claimant, who was born on February 1, 1933, filed an application for old-age insurance benefits. He indicated that he expected to become entitled to a pension based upon noncovered employement in January 1998. On this application, the claimant acknowledged that his civil service pension would offset his Social Security benefits and that he agreed to report the amount of his civil service annuity so as to avoid an overpayment (Exhibit 1). The Administration indicated that it did not receive a report of the claimant's receipt of the civil service annuity or its amount timely. Once the necessary development was completed and the windfall elimination provision was applied, the Administration determined that the claimant received an overpayment of $5,791 (Exhibit 3 and 6). The Administration further determined that the claimant was nto without fault in causing the overpayment because his application shows that he was informed of necessity of reporting his receipt of his civil service annuity and there was no record of his making such a report (Exhibit 3).

In connection with his request for review, the claimant submitted copies of a "Postadjudicative Routing" form and a civil service annity explanation, which he contended shows that he submitted proof of his civil service annuity in June 1998. A review of the claims file located the originals of these documents. These documents should be considered in determining whether the claimant was without fault in causing the overpayment because the Social Security Administration and the Administrative Law Judge indicated that there was no proof that the claimant reported the start of his civil service annuity.

Accordingly, the Appeals Council hereby remands this case to the Administrative Law Judge for further consideration of this case. Upon remand, the Administrative Law Judge will enter the following documents in to the evidentiary record: the claimant's letter of June 27, 2003, with attachements, and the "Postadjudicative Routing" form dated June 26, 1998, with an attachment. The Administrative Law Judge will have the claimant submit either a fully completed "Request For Waiver of Overpayment Recovery or Change in Repayment Rate" or an explanation for why he declines to submit such a form. The Administrative Law Judge will provide the claimant an opportunity to review the evidentiary record and to submit additional information and/or testimony.

Upon completion of the record, the Administrative Law Judge will make findings and issue a decision regarding whether the Social Security Administration applied the windfall elimination provision correctly, whether the claimant is receiving the highest possible old-age insurance benefits; and whether the claimant received an overpayment. If the claimant received an overpayment, the Administrative Law Judge will make the findings regarding whether the claimant was without fault in causing it (20 CFR 404.507) and, if necessary, whether recovery would either defeat the purpose of Title II of the Act (20 CFR 404.508) or be against equity and good conscience (20 CFR 404.509). The Administrative Law Judge will issue a decision regarding whether recovery of the overpayment may be waived (20 CFR 404.506).

Also in the request for review, the claimant contended that the Administrative Law Judge did not afford him a proper opportunity to present his case. He contended that the Administrative Law Judge refused to allow him to

present an oral argument at the hearing and requested that he submit a written presentation. He further indicated that the Administrative Law Judge did not give him a time frame for submitting the written presentation, which he submitted three weeks after the oral hearing; however, the Administrative Law Judge issued his decision without waiting for his presentation.

The Appeals Council thoroughly reviewed the evidentiary record, including auditing the tapes made of the hearings of January 31, 2003 and May 7, 2003. The Administrative Law Judge closed the first hearing in order for the claimant to seek legal representation. At the second hearing, the Administrative Law Judge asked the claimant whether Exhibits 12 and 13 contained his arguments, which they did. He requested that, rather than the claimant reading Exhibit 13 into the record, he would review the claimant's written arguments, as presented in Exhibits 12 and 13. The claimant expressed no disagreement with this and did not request additional time to submit additional information. Apparently, there was a misunderstanding between the claimant and the Administrative Law Judge regarding what information he would consider. This remand will provide the claimant with an opportunity for an oral hearing at which he may submit additional evidence and testimony.

In compliance with the above, the Administrative Law Judge will offer the claimant opportunity for a hearing, address the evidence which was submitted with the request for review, take any futher action needed to complete the administrative record and issue a new decision.

APPEALS COUNCIL

ORIGINAL SIGNED BY:

Peter N. Dowd
Administrative Appeals Judge

ORIGINAL SIGNED BY:
Ellan R. Hylton
Administrative Appeals Judge

Date: February 9 2004

SOCIAL SECURITY ADMINISTRATION

Refer to: 146-34-0257

Office of Hearings
and Appeals
Breyer Office Park
8380 Old York Rd.,
Ste. 250
Elkins Park, PA 19027
Date: 27 May 2003

Mr. A. M. Elshinnawy
397 Stratford Avenue
Collegeville, PA 19426

NOTICE OF DECISION - UNFAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With This Decision

If you disagree with this decision, you may file an appeal with the Appeals Council.

How to File An Appeal

To File an appeal, you or your representative, if you choose to appoint one, must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

APPENDIX J

You May file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

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You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How an Appeal Works

Our regulations state the rules the Appeals Council apples to decide when and how to review a acase. These rules appear in the Code of Federal Regulations, Title 20, Chapter III.

If you file an appeal, the Council will consider all of my decison, even the parts with which you agree.

The Council may review your case for any reason. It will review your case if one of the reasons for review listed in our regulation exists.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision more or less favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

If No Appeal and No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

If you have any questions,you may call, write, or visit any Social Security office. If you do call or visit an office,please have this notice with you. The telephone number of the local office that serves your area is 800-772-1213. Its address is: 1713 Markley Steret, Norristown PA 19401.

Henry E. Oliver
Administrative Law Judge

SOCIAL SECURITY ADMINISTRATION
Office Of Hearings And Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
A.M. Elshinnawy	Retirement Survivors Insurance Benefit (Overpayment)
_____ (Wage Earner)	146-34-0257 (Social Security Number)

STATEMENT OF PROCEDURAL HISTORY

The claimant filed application for Retirement Insurance Benefits on November 12, 1997. At that time he acknowledged that he would be receiving a civil service pension and that he was aware of the fact that receipt of such pension would act as an offset against his retirement insurance benefits. As such, he agreed to advise the SSA "as soon as I know what my pension amount is so as to avoid any overpayment from Social Security" (ex. 1) The claimant was awarded entitlement to the SSA Retirement Insurance Benefits (RSI) beginning January 1998 and also began to receive civil service pension benefits which should have acted as an offset against SSA RSI payments but no such offset action was taken. As such, claimant was overpaid in the amount of $5,791 prior the time that SSA became aware of the problem and he was so advised on February 14, 2000.

Claimant then appealed the matter through a Request for Hearing of June 7, 2002. Pursuant to such, a hearing was convened on May 7, 2003, in Elkins Park, PA at which

time claimant waived his right to representation, knowingly and willingly.

STATEMENT OF ISSUES AND LAW AND CONCLUSION

The specific issues for consideration herein are whether the claimant was "without fault" in the generation of the overpayment and, if so, whether recovery of the overpayment would defeat the purposes of Title II. A secondary issue is whether the amount of the overpayment is correct.

Section 204(a)(b) of the Act requires that incorrect payments must be recovered or adjusted against benefits later payable unless the overpaid individual meets both the following conditions: 1. The individual is completely without fault in causing the incorrect payments and; 2. To recover payment would be against equity and good conscience, or would otherwise defeat the purpose of the Act.

Under 20 C.F.R. 404.501, citing to Section 204 of the Act, it is provided that adjustment of social security payments will be appropriate in cases where an individual receives more than the correct payment due under Title II of the Act.

Under 20 C.F.R. 404.502(a), if the individual to whom an overpayment is made is, at the time of a determination of overpayment, entitled to a monthly benefit, no such monthly benefit will be paid until an amount equal to the overpayment is withheld.

Under 20 C.F.R. 404.507, it is provided that the Social Security Administration must consider an overpaid

individual's total situation in determining whether they were at fault in creating an overpayment. An individual will not be found to be "without fault" if the evidence shows that the incorrect payment, among other things, is caused by acceptance by the claimant of a payment that he or she knew or should have known, was incorrect.

DISCUSSION OF THE EVIDENCE

The record indicates that the claimant was aware of his responsibilities with respect to receipt of SSA RSI benefits, i.e., the need to advise the administration of his receipt of civil service pension payments when received. It also shows that claimant was aware of the fact that offset of SSA RSI payments was directed on the basis of how much he received through his civil service pension (Ex. 1). There is nothing in the record to show that claimant ever advised the SSA of his receipt of civil service pension payments notwithstanding his knowledge of his obligations.

At the time of his reconsideration request, claimant submitted a document in which he did not question the fact of "overpayment" simply the amount (ex. 5). When provided the opportunity to present argument at the time of his reconsideration however, claimant basically advised that he was without fault in the generation of the overpayment, as he had provided both oral and documentary information to the SSA as to his receipt of civil service pension and he then refused to provide sufficient information as to his income, resources, and expenses so that full waiver consideration could be given to his appeal (Ex. 3). The SSA then affirmed the initial determination as to overpayment, inasmuch as claimant's contentions as to meeting his obligations vis-à-vis his reporting civil service pension receipt, could not be

verified, i.e. he was not without fault in the generation of the overpayment.

As such, procedurally, this case comes before the undersigned in mixed fashion. That is, claimant has questioned both the fact that he was overpaid (as he does not consider himself at fault), and the amount of the overpayment. Based on my review of the record, including the testimony of claimant, I find that claimant was not "without fault" and that recovery of the overpayment should proceed under an installment repayment plan; such a plan was offered to and accepted by claimant (Ex. 8). I also find that the amount of the overpayment is correct.

In this regard, the undersigned notes that the claimant has provided no evidence of the fact that he ever advised the SSA of his receipt of civil service pension while also in receipt of RSI payments. Since he knew of the obligation, and since the SSA continued to pay him an unreduced RSI benefits, notwithstanding any of his allegations to the contrary, this is the reason that he was overpaid. He thus cannot be found without fault in the generation of the overpayment.

Claimant has also provided an extensive explanation of how the SSA wrongly calculated the overpayment (Ex. 13) based upon his rudimentary knowledge of the regulations. On the other hand, an employee of the SSA, with expert knowledge of RSI benefit calculation versus civil service pension offset has also provided a comprehensive explanation of how the overpayment was calculated (Ex. 7). The undersigned finds that the latter document is most probative reference the question of the correct overpayment ($5,791) assigned to the claimant.

In conclusion, the claimant was overpaid in the amount of $5,791, a sum which was correctly computed by the SSA. He cannot be considered "without fault" in the generation of this overpayment. Therefore, the second step of the waiver procedure, i.e. consideration of whether recovery of such overpayment can be deemed against equity and good conscience is not reached. The overpayment is upheld and recovery should be made under the appropriate provisions of the regulations.

FINDINGS

1. Claimant has been properly charged with overpayment in the amount of $4,791.

2. Waiver of overpayment is not appropriate as claimant was not "without fault" in the generation of the overpayment of $5,791.

DECISION

It is the decision of this Administrative Law Judge that the claimant is not without fault and not entitled to waiver o the overpayment at issue, in the amount of $5,791, under Section 204, and recovery of the overpayment would not defeat the purposes of Title II of the Act.

/s/

Henry E. Oliver
Administrative Law Judge

27 May 2003

Exhibit List (RSI)

Claimant: A.M Elshinnawy
SSN 146-34-0257

No.	Description	Pages
1	Application for retirement insurance benefits filed 11/12/97	3
2	Request for waiver of overpayment recovery change in repayment rate dated 7/11/00	8
3	report of contact RS: Waiver discrimination dated 7/11/00	2
4	Letter dated 8/3/00 RE: overpayment of $5791.00	1
5	Request for reconsideration filed 8/16/00	2
6	Social Security Notice of reconsideration filed 4/08/02	6
7	Letter dated 5/2/02 RE: Reconsideration Denial	2
8	Request for hearing filed 6/07/02	3
9	Acknowledgment letter for recipient of request for hearing dated 6/18/02	
10	Earnings Record	4

Social Security
Notice of Reconsideration

From Mid- Atlantic Program Service Center
Philadelphia Pennsylvania 19123

AM Elshinnaway
397 Stratford Ave.
Collegeville Pa 19426-2545

Date April 8, 2002

Claim Number 146-34-0257

Your claim has been reconsidered, as you requested. We find that original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the reconsideration determination is not correct, you may request a hearing before and administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must report it no later then 60 days from the date you receive this notice. You should make your request through any social security office.

APPENDIX K

Please read the enclosed leaflet for a full explanation of your right to appeal. A copy of this notice has been sent to your attorney.

Enclosures:
SSA-662
SSA-10282

Department of Health and Human Services
Social Security Administration Form SSA-L244 (9-80)

SOCIAL SECURITY ADMINISTRATION
Reconsideration Determination

MID-ATLANTIC PROGRAM SERVICE CENTER Philadelphia, PA 19123	**DISTRICT OR BRANCH OFFICE** Norristown, Pa.
NUMBER HOLDER A. M. Elshinnawy	**SOCIAL SECURITY CLAIM NUMBER** 146-34-0257
NAME OF CLAIMANT A. M. Elshinnawy	**TYPE OF CLAIM** Retirement Insurance Benefits

Determination:
On November 1997 A. M. Elshinnawy filed a claim with the Social Security Administration for retirement benefits. He was born on February 1, 1933, and he was fully insured for retirement benefits. He was awarded entitlement beginning January 1998.

On February 14, 2000, A. M. Elshinnawy was advised by the Social Security Administration that he was overpaid $5,791.00 due to the reduction in his benefit amount retroactive to January 1998 because he received a government pension based on his own work that was not covered under Social Security.

On August 15, 2000, A. M. Elshinnawy filed for reconsideration and stated that his Social Security Benefits were based on his contribution to the Social Security system while working for a private company and his pension was based on his contributions to the Civil Service system, and therefore, he feel there should be no

affect on his Social Security benefit. Also, he wanted the calculation regarding his benefit amount and overpayment rechecked as he did not believe they were correct.

The issue to be determines is whether the benefit amount paid to A. M. Elshinnawy was correctly reduced and whether the overpayment amount to him is correct.

Section 215(a) of the Act sets forth the methods for determining an individual's "primary insurance amount," which is the basic figure governing all benefit amounts on the earnings record. Except as otherwise provided in this Section, the primary insurance amount of an individual who attains age 62 in 1995 shall be equal to the sum of:

(1) Ninety percent of the first $426.00 of the individual's average indexed monthly earnings, plus
(2) Thirty-two percent of the average indexed monthly earnings between $426.00 and $2,567.00, plus
(3) Fifteen percent of the average indexed monthly earnings above $2,567.00. If the primary insurance amount is not a multiple of $ 0.10, it is rounded to the next lower multiple of $ 0.10. Benefits must be rounded down to the nearest lower whole dollar. This rounding is required by Section 215(g) of the Act.

Section 215(b)(1) of the Act provides that an individual's average indexed monthly earnings shall be determined by dividing the total indexed earnings for the number of years used by the number of months in such years.

Indexing is a mechanism for expressing prior year earnings in terms of their current dollar value. The method of accomplishing this involves the multiplying of the unindexed earnings for each year after 1950 up to the benchmark year by the average earnings for all workers in

the benchmark year and then dividing by the average wages in the year which is being indexed. The benchmark year is the second year before the year of attainment of age 62.

Section 215 (b) (2) (A) of the Act provides that the number of an individual's computation years equals the number of elapsed years reduced by five, except that the number of elapsed years may not be less than two.

Section 215 (b) (2) (B) of the Act provides that the term "elapsed years" means the number of calendar years after 1950 (or, if later, after the year of attainment of age 22) and before the year in which the worker died, became disabled or attained age 62 (whichever occurred first).

Section 215(f) of the Act provides for the recomputation of a worker's benefit amount on the basis of additional covered earnings.

Social Security records show the following covered work history for A. M. Elshinnawy:

YR	EARNINGS		
60	00891.97	72	10462.32
62	02268.12	73	11497.50
64	06404.92	74	13200.00
65	04800.00	75	14100.00
66	06600.00	76	15300.00
67	06600.00	77	18692.32
68	07800.00	78	17700.00
69	07800.00	79	22900.00
70	07800.00	80	25900.00
71	10390.18	81	16827.00
		95	05951.57

After "indexing", these earnings become:

YR	EARNINGS		
60	5149.25	72	29184.17
62	12226.24	73	32958.78
64	24263.34	74	38022.71
65	23834.19	75	37790.95
66	30916.26	76	38360.23
67	29285.01	77	39029.75
68	32383.81	78	38788.09
69	30614.55	79	40146.61
70	29167.12	80	47879.34
71	27771.68	81	28261.86
		95	5951.57

This yields the following PIA's, that is, his benefit amount before reduction due to receiving a government pension based on his own work that was not covered under Social Security.

AIME PIA RESULTS

INIT BASE YEARS: 51 – 97 DIVISOR MONTHS: 420
DIVIDEND: 627985.51 ELIG YR: 95 AIME: 1495.00

DATE	PIA	1200	839.10
0198	781.70	0701	839.90
1298	791.80	1201	861.70
1299	810.80		

Section 215(A)(7) of the Social Security Act and Section 404.213 of the Social Security Regulations require modification of the formula used to determine the primary insurance amount of a person who was first eligible after 1985 for both a pension based on non-covered employment and a Social Security retirement or disability insurance benefit. This modified formula is applicable for the first month that the person is concurrently entitled to the monthly pension and the Social Security benefit. Under this modified formula the first band of the benefit formula is reduced from the usual 90 percent to 40 percent for a person who reaches age 62 or becomes disabled in 1990 or a later year. Section 404.213(e) of the Social Security Regulations No. 4 lists six exceptions to the modified computation formula. However, none of these exception are shown to be met in this case.

Based on this reduction A. M. Elshinnawy's primary insurance amount and monthly benefit amount is reduced as follows:

DATE	PIA	1200	592.70
0198	552.20	0701	593.20
1298	559.30	1201	606.80
1299	572.70		

Therefore, upon reconsideration the reduction in A. M. Elshinnawy's Social Security benefits and his benefit amounts are correct.

The following is a month by month breakdown of what was paid and what was due on A. M. Elshinnawy's account which caused the overpayment of $5,791.00.

MONTH	BENEFIT PMT (MBP)	PREMIUM WITHHELD	BENEFIT DUE (MBC)
01/1998	$ 0.00	$ 0.00	$ 0.00
02/1998	$ 561.80	$ 87.60	$ 551.80
03/1998	$ 737.00	$ 43.80	$ 551.80
04/1998	$ 737.00	$ 43.80	$ 551.80
05/1998	$ 737.00	$ 43.80	$ 551.80
06/1998	$ 737.00	$ 43.80	$ 551.80
07/1998	$ 737.00	$ 43.80	$ 551.80
	$ 131.40	$ 0.00	$ 0.00
08/1998	$ 737.00	$ 43.80	$ 551.80
09/1998	$ 737.00	$ 43.80	$ 551.80
10/1998	$ 737.00	$ 43.80	$ 551.80
11/1998	$ 737.00	$ 43.80	$ 551.80
12/1998	$ 737.00	$ 43.80	$ 551.80
Total	$8063.20	$525.60	$6069.80

MONTH	BENEFIT PMT (MBP)	PREMIUM WITHHELD	BENEFIT DUE (MBC)
01/1999	$ 746.00	$ 45.50	$ 558.50
02/1999	$ 746.00	$ 45.50	$ 558.50
03/1999	$ 746.00	$ 45.50	$ 558.50
04/1999	$ 746.00	$ 45.50	$ 558.50
05/1999	$ 746.00	$ 45.50	$ 558.50
06/1999	$ 746.00	$ 45.50	$ 558.50
07/1999	$ 746.00	$ 45.50	$ 558.50
08/1999	$ 746.00	$ 45.50	$ 558.50
09/1999	$ 746.00	$ 45.50	$ 558.50
10/1999	$ 746.00	$ 45.50	$ 558.50
11/1999	$ 746.00	$ 45.50	$ 558.50
12/1999	$ 746.00	$ 45.50	$ 558.50
Total	$8952.00	$546.00	$6702.00

MONTH	BENEFIT PMT (MBP)	PREMIUM WITHHELD	BENEFIT DUE (MBC)
01/2000	$ 765.00	$ 45.50	$ 572.50
02/2000	$ 765.00	$ 45.50	$ 572.50
03/2000	$ 527.00	$ 45.50	$ 572.50
04/2000	$ 527.00	$ 45.50	$ 572.50
05/2000	$ 527.00	$ 45.50	$ 572.50
06/2000	$ 527.00	$ 45.50	$ 572.50
07/2000	$ 527.00	$ 45.50	$ 572.50
08/2000	$ 527.00	$ 45.50	$ 572.50
09/2000	$ 527.00	$ 45.50	$ 572.50
10/2000	$ 527.00	$ 45.50	$ 572.50
11/2000	$ 527.00	$ 45.50	$ 572.50
12/2000	$ 527.00	$ 45.50	$ 572.50
Total	$6800.00	$546.00	$6870.00

MONTH	BENEFIT PMT (MBP)	PREMIUM WITHHELD	BENEFIT DUE (MBC)
01/2001	$542.00	$ 45.50	$ 572.50
02/2001	$542.00	$ 45.50	$ 572.50
03/2001	$542.00	$ 45.50	$ 572.50
04/2001	$542.00	$ 45.50	$ 572.50
05/2001	$542.00	$ 45.50	$ 572.50
06/2001	$542.00	$ 45.50	$ 572.50
07/2001	$542.00	$ 45.50	$ 572.50
	$ 19.00	$ 0.00	$ 0.00
	- 7.00	$ 0.00	$ 0.00
	- 12.00	$ 0.00	$ 0.00
08/2001	$ 543.00	$ 50.00	$ 593.00
09/2001	$ 543.00	$ 50.00	$ 593.00
10/2001	$ 543.00	$ 50.00	$ 593.00
11/2001	$ 543.00	$ 50.00	$ 593.00
12/2001	$ 543.00	$ 50.00	$ 593.00
Total	$6509.00	$600.00	$7109.00

MONTH	BENEFIT PMT (MBP)	PREMIUM WITHHELD	BENEFIT DUE (MBC)
01/2002	$554.00	$ 54.00	$ 608.00
02/2002	$554.00	$ 54.00	$ 608.00
03/2002	$554.00	$ 54.00	$ 608.00
Total	$1662.00	$162.00	$1824.00

SUMMARY OF YEARS

YEAR	BENEFIT PMT (MBP)	PREMIUM WITH-HELD	BENEFIT TOTAL	BENEFIT DUE (MBC)	OVER/ UNDER PAY-MENT
1998	$8063.20	$ 525.60	$8588.80	$6069.80	$2519.00
1999	$8952.00	$ 546.00	$9798.00	$6702.00	$2796.00
2000	$6800.00	$ 546.00	$7346.00	$6870.00	$ 476.00
2001	$6509.00	$ 600.00	$7109.00	$7109.00	$ 0.00
2002	$1662.00	$ 162.00	$1824.00	$1824.00	$ 0.00
SUMM	$31968.20	$2379.60	$34365.80	$28574.80	$5791.00

TOTAL OVER/UNDER PAYMENT $5791.00

OVERPAYMENT $ 5791.00

Therefore, the initial determination is upheld upon reconsideration. The reduction in A. M. Elshinnawy's monthly benefits and the subsequent overpayment amount of $5791.00 is correct. He will be advised later regarding the recover of the overpayment.

/s/
Kimberly Jones-Smith
Manager Module-10

Date: 04/08/02

KJS:ra
SSA-662

Social Security Administration 0111
Retirement, Survivors, and Disability Insurance
Notice of Change in Benefits

Mid-Atlantic Program Service Center
300 Spring Garden Street
Philadelphia, Pennsylvania 19123
Date: February 16, 2000
Claim Number: 146-34-0257 A

A M ELSHINNAWY
397 STRATFORD AVENUE
COLLEGEVILLE PA 19426-2545

We are writing to give you new information about the retirement benefits which you receive on this Social Security record. In the rest of this letter, we will tell you:

- How we paid you $5,791.00 too much in benefits; and
- What to do if you think we are wrong about the overpayment.

Your Benefits

We reduced the amount of your monthly Social Security Benefit beginning in January 1998. That is the first month that you were entitled to both Social Security and a pension based on work which is not covered by Social Security. Because of this pension, we must use a special formula to figure your Social Security benefit. This is why your benefit changed.

APPENDIX L

How You Can Pay Us Back

You should refund the overpayment within 30 days. Please make your check or money order payable to the

"Social Security Administration," and send it to us in the enclosed envelope. Always include your claim number (as indicated above) on the check or money order.

If we do not receive your refund within 30 days, we plan to recover the overpayment by withholding your full benefit each month beginning with the payment you would normally receive about May 10, 2000. We will continue to withhold your full benefits until the overpayment has been fully recovered.

We will pay you a monthly check of $527.00 until we start to collect the overpayment.

Do You Think We Are Wrong About The Overpayment?

You have certain rights with respect to this overpayment and its recovery.

1. Right to Appeal:
   If you disagree in any way with this overpayment determination, you have the right, within 60 days of the date you receive this notice, to request that the determination be reconsidered. If you request this independent review of the overpayment determination, please submit any additional information you have which pertains to the overpayment.

2. Right to Request Waiver:
You also have the right to request a determination concerning the need to recover the overpayment. An overpayment must be refunded or withheld from benefits unless both of the following are true:
   a. The overpayment was not your fault in any way; and
   b. You could not meet your necessary living expenses if we recovered the overpayment, or recovery would be unfair for some other reason.

If you request waiver, we may need a statement of your assets and monthly income and expenses.

If you request reconsideration and/or waiver within 30 days, the overpayment will not have to be recovered until the case is reviewed. This review is described in more detail on the attached Form SSA-3105, Important Information About Your Appeal and Waiver Rights. The people in any Social Security office will be glad to help you complete the forms for requesting reconsideration (SSA-561-U2, Request for Reconsideration) and/or waiver (SSA-632-BK, Request for Waiver of Overpayment Recovery or Change in Repayment Rate).

Even if you do not want to request reconsideration or waiver, please call, write or visit any Social Security office if the planned withholding of your monthly payment would cause hardship. Please take this letter with you if you do visit an office. Unless we hear from you within 30 days, we will withhold your payment as shown above.

Information About Medicare

We will continue to deduct Medicare premiums from your monthly checks.

Do You Think We Are Wrong?

If you think we are wrong, you have the right to appeal. We will correct mistakes. We will look at any new facts you have. Then a person who did not make the first decision will decide your case again.

You have 60 days to ask for an appeal.
The 60 days start the day after you get this letter.
You must have good reason if you wait more than 60 days to ask for an appeal.
You have to ask for an appeal in writing. We will ask you to sign a Form SSA-561-U2, called "Request for Reconsideration". Contact one of our offices if you want help.

If You Want Help With Your Appeal

You can have a friend, lawyer, or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that can help you with your appeal.

If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it. And if you hire a lawyer, we will withhold up to 25 percent of any past due benefits to pay toward the fee.

If You Have Any Questions

If you have any questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-610-277-0440. We can answer most questions over the phone. You can write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
FIRST FLOOR
1700 MARKLEY STREET
NORRISTOWN PA 19401

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

/S/
Steven G. DeMarco
Assistant Regional Commissioner,
Processing Center Operations

ENCLOSURES:
REFUND ENVELOPE SSA-3105
C

Social Security Administration 0417
Retirement, Survivors, and Disability Insurance
Notice of Award

Mid-Atlantic Program Service Center
300 Spring Garden Street
Philadelphia, Pennsylvania 19123

Date: December 22, 1997
Claim Number: 146-34-0257 A

A M ELSHINNAWY
397 STRATFORD AVENUE
COLLEGEVILLE PA 19426-=2545

We are writing to let you know that you are entitled to monthly retirement benefits from Social Security beginning January 1998.

What We Will Pay

- Your first payment is for $561.80.
- This is the money you are due through January 1998
- After the first payment, you will receive $737.00 on or about the second Wednesday of each month.
- Your monthly payments will go to the financial institution you selected.

The day we make payments on this record is based on your date of birth.

APPENDIX M

Your Benefits

We have changed the month in which you are first entitled to benefits to January 1998. This is the month which is most favorable to you.

Your benefit amount includes the recent increase because of the change in the cost of living.

Information About Medicare

We have changed the date of your entitlement to hospital insurance under Medicare. Your new entitlement date is January 1998.

We will send your Medicare card in about 4 weeks. You should take this card with you when you need medical care. If you need medical care before you receive the card, use this letter as proof that you are covered by Medicare.

The Basis for Our Decision

Based on the information given to us, you were born on February 1, 1933.

Other Social Security Benefits

The benefits described in this letter are the only ones you can receive from Social Security. If you think that you might qualify for another kind of Social Security benefit in the future, you will have to file another application.

Your Responsibilities

Your benefits are based on the information you gave us. If this information changes, it could affect your benefits. For this reason, it is important that you report changes to us right away.

We have enclosed a pamphlet, "When You Get Social Security Retirement or Survivors Benefits... What You Need to Know." It tells you what must be reported and how to report. Please be sure to read that part of the pamphlet which explains how work could change your payments.

Do You Think We Are Wrong?

If you think we are wrong, you have the right to appeal. A person who did not make the first decision will decide your case. We will correct any mistakes. We will review those parts of the decision which you believe are wrong and will look at any new facts you have. We also may review those parts which you believe are correct and may make them unfavorable or less favorable to you.

- You have 60 days to ask for an appeal.
- The 60 days start the day after you get this letter.
- You must have a good reason if you wait more than 60 days to ask for an appeal.
- You have to ask for an appeal in writing. We will ask you to sign a Form SSA-561-U2, called "Request for Reconsideration." Contact one of our offices if you want help.

If You Want Help With Your Appeal

You can have a friend, lawyer, or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that can help you with your appeal.

If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it. And if you hire a lawyer, we will withhold up to 25 percent of any past due benefits to pay toward the fee.

If You Have Any Questions

If you have any questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-610-277-0534. We can answer most questions over the phone. You can write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
FIRST FLOOR
1700 MARKLEY STREET
NORRISTOWN PA 19401

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

/S/
Kenneth S. Apfel
Commissioner Of Social Security

ENCLOSURE:
SSA-10077 C

Supreme Court, U.S.
FILED
OCT 3 0 2008
OFFICE OF THE CLERK

111

(2)

No. 07-1396

IN THE

SUPREME COURT OF THE UNITED STATES

A. M. ELSHINNAWY

Petitioner

v.

COMMISSIONER OF
SOCIAL SECURITY
ADMINISTRATION

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR REHEARING

A. M. ELSHINNAWY
397 Stratford Avenue
Collegeville, PA 19426
Phone: (610) 489-3605

BRIEF SUMMARY OF FACTS PERTAINING TO THE CASE

1 - 42 U.S.C.§415 (a) (7) was enacted to prevent individuals receiving pension based on their noncovered, by Social Security (SS), employment from obtaining full old-age SS benefits based on their covered work history and calculated by the average Indexed Monthly Earnings method.

2 – Full old-age benefits are reduced by various amounts depending on the number of years the individual has, each of which is a benefit computation year and is CREDITED WITH COVERED EARNINGS (NOT A YEAR OF WORK IN A JOB WITH COVERED EARNINGS).

3 – To facilitate the implementation of this complex benefit program, Social Security Commissioner (SSC) adopted 20 CFR 404.213 which has nine exceptions for applying benefit reductions none of which addresses the minimum total SS contributions required to avoid reductions which rendered the benefit calculation procedure unconstitutional.

4 – Petitioner's total Indexed Earnings was calculated by SS to be 627,985.51 with 35 benefit computation years rendering an average Indexed Monthly Earnings of 1495.00.

5 – The Administrative Law Judge (ALJ) described the procedure by stating:

"The revised benefit formula eliminates the windfall in benefits for individuals who have only minimal SS coverage and will receive a pension based on years of work in non-covered employment."

6 – The United States Court of Appeals states in its Opinion:

"Because Congress has delegated to the Commissioner the responsibility to administer complex benefits programs, we defer to the Commissioner's interpretation of Social Security legislation, as long as it is reasonable and not arbitrary and capricious."

7 – According to 20 CFR 404.213, an individual with similar pension and 35 benefit computation years with "substantial covered earnings," which total 181,500.00, would be exempt from benefit reduction whereas petitioner with 627,985.51 covered earnings would be subject to benefit reduction.

8 – Although the implementation of 42 U.S.C.§ 415 (a) (7) through the Commissioner's interpretation of SS Law with 20 CFR 404.213 resulted in an unjust and unconstitutional situation as is explained in paragraph 7 hereabove, the United States Court of Appeals did not consider the Commissioner's interpretation to be unreasonable and arbitrary and capricious, as indicated in paragraph 6 hereabove or it just chose to defer the decision to a higher authority.

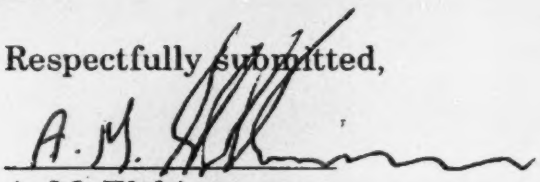
REASONS FOR ACCEPTING THE REHEARING AND GRANTING THE PETITION

The summary of the facts presented above shows that this case dealing with the petitioner's Social Security benefits which was started at retirement in January 1998 went in front of many layers of decision makers from the Administrative Law Judge to the rehearing requested from the United States Court of Appeals. Each decision maker in the process deferred the decision to the higher authority. As I presented the case to this Court, I had hoped that a decision is imminent. Regretfully, this Court looked the other way toward an important issue such as setting the just standard toward this aspect of old-age Social Security benefits which many, many people depend on for survival. If this petition does not fulfill its goals, would this Court be satisfied knowing that an unjust law dealing with vital Social Security benefits issue was left, arbitrarily, uncorrected after someone attempted to correct it for 11 years?

CONCLUSION

The petitioner respectfully requests that this Court will put this case on the right track by granting the writ of certiorari so that a just decision can be made.

Respectfully submitted,



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Dated: October 28, 2008

CERTIFICATE OF COMPLIANCE

No. 07-1396

A. M. ELSHINNAWY

Petitioner

v.

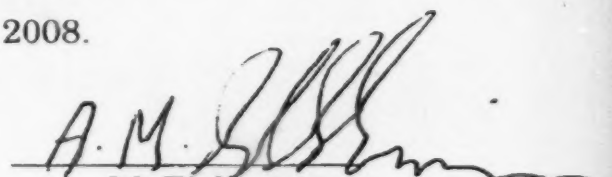
COMMISSIONER OF
SOCIAL SECURITY
ADMINISTRATION

Respondent

As required by Supreme Court Rule 44.2, I certify that the petition for rehearing is restricted to substantial grounds not previously mentioned and that it is presented in good faith and not for delay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2008.



A. M. Elshinnawy